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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-713

VIRGINIA IMPRESSION PRODUCTS CO., INC.,

Petitioner,

vs.

SCM CORPORATION,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

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REFERENCES AND ABBREVIATIONS USED IN THIS PETITION

"VIP" refers to petitioner Virginia Impression Products Co., Inc.

"SCM" refers to respondent SCM Corporation.

References to SCM's Opening Brief will be to "AOB" followed by the page number, e.g. (AOB 62).

References to SCM's Reply Brief will be to "ARB" followed by the page number, e.g. (ARB 35).

References to the opinion of the Court below will be to "App. A" followed by the page number, e.g. (App. A, 4).

References to the first three volumes of the Joint Appendix are to the page numbers contained therein, e.g., the court's charge to the jury (66-113a). Reference to testimony which is not printed in the Joint Appendix is to the specified Volume of the Record on Appeal, e.g., (RA Vol. XX, 9)

"PX" refers to exhibits numerically marked before trial by plaintiff. (PX 1-PX 1320) Those numbers were used at the trial and not marked with trial numbers as offered. PX numbered exhibits are contained in the Exhibit Volumes filed with the Joint Appendix and are referred to by the exhibit number, e.g., (PX 554).

References to the deposition testimony not included in the Joint Appendix are to the volume and page of the deposition followed by the volume and page number of the Reporter's Transcript in which cited portion of the deposition was read, e.g., (RA Vol. XIX, 101—Vol. XXXIV, 611), indicating by the first citation the volume of the Reporter's Transcript containing the deposition and by the second citation the volume of the Reporter's Transcript at which the deposition testimony was read.

In the Supreme Court of the United States

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No. .....

VIRGINIA IMPRESSION PRODUCTS CO., INC.,

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SCM CORPORATION,

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Petition for a Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

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Petitioner Virginia Impression Products Co., Inc. (hereafter "VIP"), prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on August 30, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is not yet reported. The judgment of the District Court followed a jury verdict returned on November 26, 1969. There is no opinion of the District Court.

JURISDICTION

The Court of Appeals filed its decision on August 30, 1971. A Petition for Rehearing and Suggestion for Rehearing in Banc was filed by petitioner on September 20, 1971, in accordance with Rule 40 and Rule 35, Federal Rules of Appellate Procedure. That petition was denied by order dated October 18, 1971 (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

In a two-to-one decision, the court below stripped petitioner of a judgment in the amount of $702,000 arising out of respondent SCM Corporation's (hereafter "SCM") *per se* violations of the antitrust laws[1] on the ground that VIP's antitrust claims were barred by general release language contained in a "Settlement Agreement" which had been deemed to be ambiguous by the trial judge and had been determined by the jury not to apply to federal antitrust claims.

The majority of the court below, applying state law, construed this Agreement without reference to extrinsic evidence received by the trial court and held that the federal antitrust claims were barred, notwithstanding that: (i) VIP neither knew of its potential antitrust claims nor intended to release them;[2] (ii) none of the persons actually negotiating[3] the settlement for VIP *or* SCM

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1. Resulting in part from conduct the same Court of Appeals had previously found to be *per se* violations of the federal antitrust laws. *Advance Business Systems and Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). Those same practices were subject to a consent decree by respondent before the Federal Trade Commission. See *SCM Corp.* (1970 Trade Cases, ¶ 19,191).

2. ARB 2; Redman 611-614a.

3. The negotiations were conducted in two stages. The first stage involved negotiations between VIP's president and certain SCM personnel and was concerned only with outstanding orders and accounts. After agreement was reached, SCM engaged local counsel to prepare a written agreement. During this second stage of the negotiations, SCM's local

believed it covered antitrust claims; rather, they understood that "those differences" referred to in the Settlement Agreement related only to disputed commercial account items outstanding at the time of VIP's termination as an SCM dealer;[4] (iii) SCM acknowledged that only its own counsel were aware of VIP's possible antitrust claims[5]; (iv) SCM specifically instructed its counsel "not to specify the claims being released"[6]; (v) SCM concealed from VIP the reasons for its termination[7]; and (vi) the petitioner's complaint (which has now been dismissed in its entirety) included claims which arose from violations of the antitrust laws by SCM which occurred *after* the date of the Settlement Agreement.

The questions presented are:

(1) Do not the policies underlying federally created antitrust rights, as recently articulated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)[8] in connection with releases, require a uniformly applied rule of release construction (unencumbered by a particular state's version of the parol evidence rule) under which the scope and effect of a release pleaded as a defense to a federal antitrust claim is to be determined in accordance with the intentions of the parties, ascertained by extrinsic evidence, if necessary?

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counsel prepared the Settlement Agreement, including the general release language, taking care "not to specify the claims being released" in accordance with his instructions from SCM. (Freeman 1291a) Regarding the two-stage negotiations the trial court observed in chambers that "a beautiful argument could be made that they [SCM] led this man [VIP's president] down the primrose path" by leading him to believe only the commercial accounts were being settled and later "slip[ping] that general release in on them. . . ." (RA Vol. XXXIX, 9)

4. PX 1241, Noone 1186a; 1192a; Lett 340-341a; Redman 611-614a.

5. ARB 3, 7.

6. Freeman 1291a.

7. Lett 331-333a, 336-337a, 341a, 377-378a; Rush 1086a; Redman 602a, 611-613a; Noone 734a, 747a.

8. In *Zenith*, this Court held specifically that "* * * the effect of a release upon coconspirators shall be determined in accordance with the intentions of the parties," and that "the straightforward rule is that a party releases only those other parties whom he intends to release." (401 U.S. at ....., S.Ct. at 809-10)

(2) If there is not to be a uniform federal rule governing releases of federal antitrust claims, should not there be, at the very least, a rule requiring that to the extent state law is applied it should comport with and further the policy of the federal antitrust laws, by requiring that the releasor intended to release the antitrust claims before he can be held to have released them?

(3) Can a release bar a claim for damages caused by antitrust violations occurring after the release was signed,[9] or is not such a release void as against public policy?

STATEMENT OF THE CASE

1. The Complaint and Trial

VIP, an independent dealer in photocopy machines and supplies in Richmond, Virginia, brought this antitrust action in the United States District Court for the Eastern District of Virginia, Richmond Division, on March 18, 1968, to recover treble the damages it had suffered by reason of certain practices and policies of SCM.

A. PRE-RELEASE VIOLATIONS.

VIP was terminated as an SCM dealer in furtherance of a photocopy marketing program, which included: (1) the "user policy,"[10] under which SCM required its independent dealers to refuse to sell SCM machines or spare parts it had purchased from SCM to anyone other than the ultimate user of the machine;[11] (2) a requirement prohibiting independent dealers from sell-

9. The court below ordered *dismissal* of petitioner's complaint which contained allegations of antitrust violations and damages occurring subsequent to the execution of the release. The effect of the court's decision was forever to bar petitioner from litigating these post-release rights. See discussion at pp. 16-17, *infra*.

10. So-described by SCM's officers. (Burns 568a)

11. *Per se* illegal under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Burns 563a, 1134a; Kunkel 552-553a; Rush 1080a; Hall 758a; Roberts 390a.

ing their own SCM machines outside assigned territories;[12] (3) a prohibition against independent dealers handling competitive paper;[13] (4) a policy requiring SCM service personnel and independent dealers to refuse to perform service on SCM machines under maintenance agreements or guarantees where the customer was using competitive paper in the machine;[14] and (5) a policy of refusing to sell toner[15] separate from SCM paper unless the customer (including independent dealers) was willing to pay $85 per pint,[16] whereas immediately prior to the institution of this component of the policy, SCM had sold toner for only $1.75 per pint.[17]

The overall program was designed by SCM to ensure that every copy made in an SCM photocopy machine be made on specially-treated photocopy paper purchased only from SCM,[18] even though paper sold by competitive suppliers was equal or superior to SCM paper for use in SCM machines.

On April 7, 1964, SCM discovered that VIP had violated the user and territorial restriction policies by selling SCM photocopy machines outside its assigned territory to a competitive dealer.[19]

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12. *Per se* illegal under *Schwinn*. Kunkel 544a; Rush 1080-1081a; Roberts 383a; Lett 321a, 323a.

13. PX 263-264; Kunkel 548-549a; Magruder 787-788a; Roberts 398a.

14. *Per se* illegal under *Advance Business Systems & Supply Co. v. SCM Corp., supra*, n. 1. PX 98; PX 542; PX 818; PX 754; PX 804; PX 876; PX 877; PX 1091.

15. The counterpart of ink.

16. *Per se* illegal under *Advance Business Systems & Supply Co. v. SCM Corp.*, 287 F.Supp. 143 (D.Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969). PX 367c.

17. The $85 price was set in response to reports that Bruning paper was being sold at half the price of SCM paper and that they were making competitive inroads into SCM's paper business. The price was calculated so that the cost to the customer of Bruning paper and SCM toner at $85 per pint would be the same as if the customer had purchased SCM paper and got the toner free. (PX 121; PX 165; Burns 1150-1157a)

18. Unlike Xerox photocopy machines, which employ an indirect process and can make copies on bond paper, the SCM machines can make copies only on paper coated with zinc oxide.

19. PX 438.

On April 8, 1964, VIP was terminated as an SCM dealer.[20]

B. POST-RELEASE VIOLATIONS.

Subsequent to VIP's termination and the execution of the Settlement Agreement, SCM's refusal to sell parts and machines to VIP and the difficulties of selling paper to owners of SCM machines in the face of SCM's service policies, sabotage of machines and false statements caused petitioner additional damage.[21]

C. THE RELEASE DEFENSE.

As a defense to that portion of VIP's action relating to lost sales arising from its termination, SCM asserted a Settlement Agreement which had been executed on September 15, 1964, by VIP and SCM. This Agreement followed weeks of negotiating certain differences the parties had in regard to the state of the commercial account between them following SCM's termination of VIP as an authorized SCM photocopy dealer. It recited that ". . . the parties *have had certain differences* in regard to and growing out of the termination . . . of their Office Equipment Dealer Contract" and that they ". . . desire to settle *those differences*. . . ." Later in the agreement there appeared boiler plate and form book general release language reciting the release of unknown claims.[22]

Because of the reference to the *"certain differences"* the parties had *"had"* and the recital that the parties desire "to settle *those*

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20. Lett 331a; PX 1197.

21. One SCM serviceman, for example, testified that he allowed VIP's major customer to think that the customer's copy jamming problems were being caused by VIP's line of competitive paper, although he knew that the problem was actually resulting from an SCM machine malfunction. (Porter, RA Vol. XLVI, 7-10) Another serviceman admitted that he sabotaged machines where he found competitive paper being used. (Cashwell, RA Vol. XLV, 20-21) A VIP customer testified that she was told that the use of non-SCM paper would damage the machine and that SCM would rescind its service policy if she continued to use competitive paper. (Schmidt, RA Vol. XXXIV, 686, 692)

22. The full text of the Settlement Agreement is set forth in Appendix A at pp. 3-4.

differences," the trial court found the Agreement to be ambiguous and admitted evidence regarding the true intent of the parties and the circumstances under which the Agreement was prepared and executed. The court submitted to the jury the question of whether this language was intended to apply only to unknown claims relating to the accounting disputes or whether it was intended also to foreclose relief under the federal antitrust laws. Also submitted to the jury, at the insistence of SCM, were the issues of fraud, unilateral and mutual mistake.[23]

Although the jury was not asked to return a special verdict on the release issues, it is clear that it found for VIP.[24] It returned a general verdict in favor of VIP in the amount of $195,000, which was subsequently trebled by the court.

2. The Appeal

On August 30, 1971, the Court of Appeals for the Fourth Circuit in a split decision reversed the verdict and judgment of the trial court. It decided only the release question. It did so by applying Virginia law[24a] and holding that ". . . the language of the settlement agreement, especially paragraph two, is plainly a general release without ambiguity." (App. A, 4) The court below held as a matter of law that the intent of the parties to agree to mutual general releases was clear from the face of the instrument viewed as a whole, and that resort to extrinsic facts concerning the intent of the parties, or the circumstances under which the agreement was negotiated and executed, was unnecessary.

The dissent stated that the scope and effect of the release was an issue properly submitted to the jury and concluded ". . . that the

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23. 1449-1450a.

24. The evidence was clear that at the time the agreement was signed, the only "certain differences" the parties had *"had"* were those relating to the settlement of the commercial account, including commissions, return allowances and defective merchandise. See discussion *supra,* pp. 2-3 and n. 2-7. See also dissenting opinion, App. A, 15-16.

24a. The Agreement states that it "shall be governed by Virginia law."

release was sufficiently ambiguous that a reasonable jury could construe it not to be a bar... ." (App. A, 9) Moreover, the dissent, citing *Zenith,* and Congressional policy favoring private antitrust enforcement stated: ". . . the federal policy in favor of private enforcement of the antitrust laws supports permitting the jury to consider extrinsic evidence and to construe the release narrowly." (App. A, 14)

The court below did not discuss petitioner's claims that it was injured by SCM's violations of the antitrust laws which occurred *after* the execution of the Settlement Agreement. It concluded simply that because the Settlement Agreement granted mutual general releases all matters were settled "forever" (App. A, 4) and that the verdict of the trial court be vacated and the entire complaint dismissed. Thus, the court below held *sub silentio* that the Settlement Agreement barred even those claims arising from SCM's *future* violations of the antitrust laws, contrary to the decisions of this Court and lower federal courts holding that such a release would be void as against public policy.[25]

REASONS FOR GRANTING THE WRIT

I

The Federal Policy Favoring Private Enforcement of the Antitrust Laws Would Be Furthered by a Federal Rule of Release Construction Under Which the Releasor Could Only Be Held to Release Antitrust Claims Which He Intended to Release

The federal policy encouraging the private enforcement of the antitrust laws through private attorneys general has been frequently expressed by this Court. In *Zenith Radio Corp. v. Hazltine Research, Inc.,* 401 U.S. 321 (1971), this Court recently reaffirmed this policy in holding that the effect of a release of an antitrust claim on coconspirators "shall be determined in accordance with

25. See discussion and citations *infra,* pp. 17-18.

the intentions of the parties,"[26] rather than by reference to the common law rule that a release of one joint tortfeasor is a release of all.[27]

Over the past decade this Court has encouraged private enforcement by restricting the application of legally sophisticated defenses which bore no economic or social relation to the purposes of the antitrust laws and which impeded the remedies otherwise available to victims of their violation. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), this Court put an end to the distinction between the standards of proof required to show the fact of, as distinguished from the amount of, damage which distinction had, in the past, provided protection to antitrust defendants.[28] In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), this Court closed the *"in pari delicto"* escape hatch. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the "passing on" defense was sharply limited, as was the defense of retroactivity. In *Leh v. General Petroleum Corporation*, 382 U.S. 54 (1965) *reh.den.*, 382 U.S. 1001 (1966), and *Minnesota M. & M. Co. v. New Jersey Wood Fin. Co.*, 381 U.S. 311 (1965) the Court interpreted Sec. 5(b) of the Clayton Act (regarding the tolling of statutes of limitations) so as to preserve the actions of private antitrust plaintiffs. In *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), the Court defined "combination" so as to limit severely the force of the *Colgate* "unilateral refusal to deal" doctrine. In *Perkins v. Standard Oil Co. of California*, 395

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26. 401 U.S. at , 91 S.Ct. at 810 (1971).

27. This Court also found that the common law rule (and the rule prevalent in many states) laid "a trap for unwary plaintiffs' attorneys" (*id.* at p. 816) and thus hindered the private enforcement of the antitrust laws.

28. See also, *Perkins v. Standard Oil Company of California*, 395 U.S. 642 (1969).

U.S. 642 (1969), the "remoteness" defenses were restricted. Finally, in *Zenith Radio Corp. v. Hazeltine Research, supra,* the date of the running of the statute of limitations and the effect of a release on joint tortfeasors were interpreted in a manner which preserved the claims of private antitrust plaintiffs.

The time has come for this Court to remove one of the few remaining impediments to effective private enforcement of the antitrust laws—the "general release", negotiated and executed without reference to antitrust claims. Although the amicable settlement and release of claims, including federal antitrust claims, is to be encouraged (*Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950)), this Court should require that releases of federal antitrust claims are subject to federal law and that a releasor shall only be held to release claims which he intended to release. The competing social values involved here can be realistically accommodated without doing violence to either, and it is in the arena of such conflicting social values that this Court alone can and should act. *Certainly where, as here, the factual predicate for its claim has been consciously concealed from it and counsel instructed not to specify the claims being released, a purported release should not bar a victim of antitrust violations from recourse to the courts under the federal antitrust laws.*

II

The Decision of the Court Below Decided an Important Question of Federal Law Which Is in Conflict with Both the Philosophy and Rule Announced by This Court in Zenith Radio Corp. v. Hazeltine Research Inc.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), this Court confronted the issue of whether or not a release of an antitrust claim, not expressly reserving rights against a coconspirator, nonetheless operated to exonerate the coconspirator. In holding that "* * * the effect of the release

upon coconspirators shall be determined in accordance with the intentions of the parties" (401 U.S. at ....., 91 S.Ct. at 809-10), this Court assumed that federal law controlled the release issue and then proceeded to select, from among three possible rules, the one which was least technical and most promotive of the policies underlying the antitrust laws. This Court stated that such a rule

> "* * * is most consistent with the aims and purposes of the treble damages remedy under the antitrust laws. We must keep in mind the multistate and multiparty character of much private antitrust litigation; * * * The straightforward rule is that a party releases only those other parties whom he intends to release." (401 U.S. at ....., 91 S.Ct. at 816)

The same policy considerations—uniformity and deterrence—which accounted for the holding in *Zenith*, apply with equal force to the present case. If a party should not be held to have released *persons* he did not intend to release, he should not be held to have released *claims* which he did not intend to release, and certainly not claims of which he was not even aware. Although this Court in *Zenith* sanctioned an inquiry into the facts and circumstances surrounding and leading up to the execution of the releasing instrument in order to determine the intent of the releasor, two out of three members of the court below held that the trial court's efforts to make such an inquiry in the instant case was reversible error.

In purporting to apply Virginia law,[29] the court, although paying lip service to the compelling public policy underlying private en-

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29. Under Virginia law the decision is also incorrect but we do not burden the Court with this issue. *The Virginia cases are clear, however, that it was proper for the trial court to submit to the jury the issue of the party's intention to a release in order to determine whether or not a particular claim is embraced by it.* See, e.g., *Smith v. Hensley*, 202 Va. 700, 119 S.E.2d 332 (1961): "The evidence shows that it was not within the contemplation and intention of the parties that the notation . . . was to relieve the appellant from liability arising out of the sale to him of the Cool Roof products. For a release to be final and complete it must

forcement of the antitrust laws (App. A, 11), erred in limiting its consideration to the four corners of the Settlement Agreement and in applying an antiquated "plain meaning of words" rule of interpretation.[30] By restricting its inquiry in this manner, the court arrived at a "clear meaning" of the Agreement which directly contradicts the meaning arrived at by the trial court and the jury who heard the evidence and observed those who gave it.[31]

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have been so intended by the parties. The evidence presented a factual situation for determination by the jury. [citation]" (119 S.E.2d at 335); *Mercury Ins. Co. v. Griffith*, 178 Va. 9, 16 S.E.2d 312 (1941): "The acceptance of a check on which appears 'in full of account,' or words of like import, does not in fact close the account unless is [sic] was accepted with intelligent appreciation of its possible consequences, coupled with knowledge of relevant facts. To be final it must have been so intended." (16 S.E.2d at 316); and *Atlantic Greyhound Lines, Inc. of West Virginia v. Metz*, 70 F.2d 166 (4th Cir. 1934) (apparently applying Virginia law): "The doctrine is firmly rooted in equity that when an instrument is so general in its terms as to release the rights of a party of which he was ignorant, and which were not in contemplation of the bargain at the time it was made, the instrument will be restrained to the purposes of the bargain, and the release confined to the right intended to be released [citations]." (70 F.2d at 168-169)

30. As observed by Chief Justice Traynor in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage and R. Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968): "If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, * * *.' [citations] The meaning of particular words or groups of words varies with the '* * * verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). * * * a word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' (Corbin, The Interpretation of Words and the Parol Evidence Rule (1965) 50 Cornell L.Q. 161, 187.) Accordingly, the meaning of a writing '* * * can only be found by interpretation in light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.' [citations omitted]" (69 Cal.Rptr. at 564-565)

31. 1278a; 1487-1488a; RA Vol. XXXIX, 4-5, 8-9, 15.

III

Confusion Exists in the Circuit and District Court Cases Regarding Both the Interpretation of Releases of Federal Antitrust Claims and the Applicability of the Parol Evidence Rule

The lower court's decision also raises an important federal question, never before squarely decided, which this Court ought to settle in order to eliminate confusion surrounding the construction of releases of antitrust claims and, therefore, private enforcement of the antitrust laws.

Broadly stated, the issue is whether a single, uniform federal rule should control the construction and interpretation of a purported release of a federal antitrust claim or whether the release of a federally-created cause of action is to be measured by the release rules of 50 separate state jurisdictions. Subsidiary questions are (a) whether the vagaries of the states' varying versions of the parol evidence rule and the myriad exceptions thereto are to be declared an integral part of federal antitrust jurisprudence, and (b) even assuming there is to be no single, uniform federal rule, whether state rules must not be applied in such a way as to comport with the strong private enforcement and deterrent policy underlying the antitrust laws.

Although petitioner has found no other Court of Appeals decision deciding the precise question, it is clear that the decisions of the circuit and district courts concerning releases of federal antitrust claims are varying and confusing; if not actually conflicting.[32] Some cases expressly apply state law without reference to federal law or policy; others do so implicitly. Others apply state law with a view to compliance with federal policy. Still others apply a federal rule. Many cases simply decide questions regarding

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32. See Appendix C for a collection of cases reflecting the various approaches. Although many of the cases cited in Appendix C deal with the effect of the release of a joint tortfeasor and, in view of the *Zenith* decision, no longer present a conflict, the varying approaches to the question of applicable law reflected in those cases typify the confusion that surrounds other issues involving the release of antitrust claims.

releases of antitrust claims without any discussion of the law being applied.

While both the issue involved in and the policy considerations giving rise to the decision in the *Zenith* case are parallel to those in the present case, this Court, in order to eliminate any uncertainty, ought to settle the question of what law should apply and set forth a uniform rule of construction for releases claimed to encompass federal antitrust claims.

On other occasions, this Court has held that a release of a federally created statutory claim raises pervasive federal questions which are to be determined by federal rather than state law. See, e.g., *Dice v. Akron, Canton and Youngstown R. Co.*, 342 U.S. 359 (1952), holding that the validity of a release of a claim under the Federal Employers Liability Act raises federal questions to be determined by federal rather than state law; and *Aro Manufacturing Co. v. Convertible Top Placement Co.*, 377 U.S. 476 (1964), where this Court apparently formulated a uniform federal rule holding, in a patent infringement case, that a contributory infringer was not within the ambit of an earlier release given to other infringers. See also the recent Fifth Circuit decision in *Cates v. United States*, 40 Law Week 2193 (1971), holding that in a case involving a federal non-statutory cause of action (an admiralty claim) this Court's decision in *Zenith* required rejection of the common law rules dealing with releases and held, as in *Zenith*, that the intent of the parties is the sole criterion for determining the scope of a release.

The need for a uniform federal rule with reference to releases of antitrust claims is pointed up by the various approaches found in the lower federal courts. Although many of them in philosophy or rationale support petitioner's position,[33] the impact of the

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33. See, e.g., *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948); *Walder v. Paramount Publix Corp.*, 132 F.Supp. 912 (S.D.N.Y. 1955); and *Novak v. General Electric Corp.*, 282 F.Supp. 1010 (E.D.Pa. 1967), all of which were discussed in the dissenting opinion below, Appendix A.

various states' interpretation and application of the parole evidence rule makes predictability impossible. Moreover, the vagaries of the various states' interpretation of the parol evidence rule lay "trap[s] for unwary plaintiffs' attorneys",[34] contrary to the policy expressed by this Court in *Zenith*.

Even if this Court were to determine that a single uniform rule free of state evidentiary variations is not appropriate, at the very least this Court should hold that if state law is to apply, that law, including the local version of the parol evidence rule, should comport with, advance and not be inconsistent with the policy of the underlying federal statutes creating the antitrust cause of action. This view finds support in *Novak v. General Electric Corp.*, 282 F.Supp. 1010 (E.D.Pa. 1967),[35] which, curiously, is cited by both the majority and the dissent below.[36] Similarly, even if the effect of state law is unclear,[37] an interpretation should be chosen which is not inimical to the federal policy favoring private enforce-

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34. *Zenith Radio Corp. v. Hazeltine Research Inc.*, *supra.*, 401 U.S. at ....., 91 S.Ct. at 810; and, *a fortiori*, lay traps for unwary plaintiffs, not represented by counsel, as was the case with petitioner prior to and when executing the release.

35. In *Novak* the court stated that before an unknown antitrust claim may be validly released it is necessary at the very least for "* * * the court to determine that they *knew and intended* that the release cover all that it is being held to cover . . ." (282 F.Supp. at 1023), implying, of course, that extrinsic evidence should be received on the question of intent.

36. The dissenting judge, in addition to concluding that the release issue was properly a jury question, would have applied a rule similar to that set forth in *Novak:* "But even if state law is not wholly displaced, federal policy has some bearing on the question. If the state law governing releases were antagonistic to the effective enforcement of private antitrust claims, for example, the interposition of a federal rule might be appropriate. See *United States v. Yazell*, 382 U.S. 341, 352 (1966) (state interests 'should be overriden by the federal court only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.')" (App. A, 13)

37. See dissenting opinion. (App. A, 9-10)

ment of the antitrust laws, which permits the jury to consider extrinsic evidence and to construe the release narrowly. Such a rule would protect an unsophisticated victim of antitrust violations from releasing antitrust claims of which he was not aware, and would certainly protect one in petitioner's position, from whom the factual predicate for an antitrust claim had been concealed.

IV

The Order of the Court Below Violated Public Policy and the Admitted Interpretation of Both Parties by Dismissing Claims for Future Post-Release Antitrust Violations

An agreement releasing future antitrust violations is void as against public policy.[38] In ordering the complaint dismissed, including VIP's claims for damages arising out of post-release antitrust violations, the decision of the court below is in conflict with that policy and with the decisions of this Court.

Although the decision below is silent on the issue of VIP's claims arising from post-release antitrust violations, its effect is forever to bar petitioner from a recovery on such claims, notwithstanding that SCM's own pleading,[39] the pretrial statements of the parties, the concession of SCM's counsel at trial,[40] the

38. *Lawlor v. National Screen Service Corporation*, 349 U.S. 322 (1955); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 39 F.Supp. 117 (S.D.N.Y. 1941), *aff'd.*, 136 F.2d 844 (2d Cir. 1943); and *Fox Midwest Theatres v. Means*, 221 F.2d 173 (8th Cir. 1955), where the Court held: "Any contractual provision which could be argued to absolve one party from liability for future violations of the anti-trust statutes against another would to that extent be void as against public policy. * * * Such a release, if recognized as having any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade'. Section 1 of the Sherman Anti-Trust Act, 15 U.S.C.A. Section 1, of course, brands all contracts in restraint of trade as 'illegal'." 221 F.2d at 180.

39. SCM's answer which sets forth the release as a defense conceded that it applied only to that portion of the complaint which "relates to activities occurring prior to September 15, 1964," the date of the release.

40. 489a.

jury instructions and all briefs recognized that the release, even if it covered the termination aspect of the case, would not completely bar petitioner's claims. The absence of any mention of these claims suggests an oversight on the part of the court below which it refused to correct, although its error was pointed out in the Petition for Rehearing.

The complaint alleged and the evidence showed that the illegal practices of SCM were commenced prior to the termination of petitioner as an SCM dealer—and that they continued thereafter. The impact on petitioner of these continuing acts changed after its termination: whereas VIP had initially been affected by SCM's practice when it was terminated and suffered damage incident to the termination (proven at the trial through projections of income VIP would have made had it not been terminated[41]), it found itself, *after* termination, in competition with SCM just as was plaintiff in *Advance Business Systems and Supply Co. v. SCM Corp., supra.* Petitioner's post-termination damages were similar to the damages suffered by the plaintiff in that case. Therefore, even if the release covered the claims arising out of the unlawful termination, VIP would have been relegated to, but not deprived of, the second impact of SCM's post-release antitrust violations.

Because of the strong "public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble damage action"[42] this Court should grant the petitioner's petition on the additional ground that the effect accorded to the release by the court below is against public policy.

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41. Maddrea 890-895a; Mitchell 996a, 998-999a.

42. *Lawlor v. National Screen Service Corporation, supra,* 349 U.S. at 329.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to review the decision below.

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Appendix A

United States Court of Appeals
For the Fourth Circuit

No. 15,041 & 15,042

Virginia Impression Products Co., Inc.

Appellant,

versus

SCM Corporation,

Appellee.

On Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

(Argued March 3, 1971 Decided August 30, 1971.)

Before BRYAN, WINTER, and CRAVEN, Circuit Judges.

John S. Battle, Jr., and Stephen R. Kaye (Richard L. Williams, and McGuire, Woods and Battle; and Ronald S. Rauchberg and Allen P. Rosiny, and Proskauer, Rose, Goetz and Mendelsohn, and Jerry Oppenheim on brief) for Appellant in No. 15,042 and Appellee in No. 15,041; and John S. Martel (Thomas Elke, and Jerome I. Braun, and Farella, Braun and Martel; and Andrew J. Ellis, Jr., and Mays, Valentine, Davenport and Moore on brief) for Appellant in No. 15,041 and Appellee in No. 15,042.

CRAVEN, Circuit Judge

After SCM Corporation cancelled its dealership agreement with Virginia Impression Products Co. (VIP), this suit for treble damages was brought by VIP alleging that territorial and customer restrictions imposed by SCM violated the antitrust laws.[1] SCM

posed a general settlement agreement between the parties as a defense, urging that it effectively released antitrust claims as well as all others, and that VIP was barred from bringing the present action. We agree.

Between September 1962 and April 1964, VIP operated as an exclusive dealer for SCM photocopy equipment in the Richmond, Virginia, area. At the same time VIP maintained exclusive dealership arrangements with at least thirteen manufacturers of other types of office equipment. As part of its sales program, SCM gave dealers like VIP exclusive territorial sales privileges for SCM photocopy products, but these dealers were prohibited from selling to customers outside the prescribed territory or to customers who were not "users." The latter provision was an attempt to keep SCM equipment out of the hands of unauthorized dealers who did not sell SCM photocopy paper. However, two machines originally delivered to VIP were found in the hands of an unauthorized non-user outside VIP's sales area. SCM, believing that VIP had violated its customer and territorial restrictions, cancelled the dealership agreement. In the present action, VIP claims that SCM's sales restrictions violated the antitrust laws and that it was damaged as a result of SCM's unlawful activity.

After the cancellation of the dealership agreement, Mr. Sexton of SCM's legal department engaged a member of a Richmond law firm, Mr. George G. Freeman, Jr., to negotiate a settlement agreement. Sexton informed Freeman that he wanted a general release from VIP to insure that SCM would not later be confronted with an antitrust suit. After preliminary negotiations between VIP and SCM over financial differences were completed, Freeman drafted a proposed agreement and sent copies to Mr. Redman, president of VIP. The proposed settlement agreement contained the results of the financial negotiations and additionally contained mutual general releases. The entire agreement is set out in the

1. *See,* United States v. Arnold, Schwinn & Co., 388 U. S. 365 (1967).

margin.[2] Paragraph two of the agreement purported to release SCM "from any claim, demand, cause of action, and liability of every kind or character, known and unknown" arising from the cancellation of the dealership agreement. Redman, without consulting an attorney and without seeking clarification of the terms of the agreement from anyone at SCM, signed the settlement agreement as it had been submitted to him.

In 1968 the instant action was begun by VIP. SCM set up the release given in the settlement agreement as a defense. The district court, however, found the terms of the release ambiguous, and submitted the question of the intent of the parties to the jury along with questions of mutual mistake and fraud. This appeal was taken from a general verdict in favor of VIP.

2.

SETTLEMENT AGREEMENT

Whereas, SCM Corporation, a New York corporation with its principal office in New York, N. Y. (SCM), and Virginia Impression Products Company, Incorporated, a Virginia corporation with its principal office in Richmond, Virginia (Impression Products), have had certain differences in regard to and growing out of the termination on April 8, 1964, of their Office Equipment Dealer Contract, dated December 10, 1963 (the Equipment Agreement), and the parties now desire to settle those differences.

NOW, THEREPORE, SCM and Impression Products agree as follows:

1. Impression Products hereby delivers to SCM checks made payable to the order of SCM, one in the amount of $9,157.39 and dated July 31, 1964, and one in the amount of $2,000 and dated August 27, 1964. Impression Products also delivers to SCM 7 notes of Impression Products, Number 2 through 8, each dated July 27, 1964, and in the amount of $2,000, but each payable on the date indicated below:

No. 2	September 27, 1964
No. 3	October 27, 1964
No. 4	November 27, 1964
No. 5	December 27, 1964
No. 6	January 27, 1965
No. 7	February 27, 1965
No. 8	March 27, 1965

2. Impression Products hereby releases, quit-claims and discharges SCM, its successors and assigns from any claim, demand, cause of action, and liability of every kind or character, known and unknown, now existing or which may hereafter arise from the

We think the language of the settlement agreement, especially paragraph two, is plainly a general release without ambiguity. It could hardly be plainer. The district court found an ambiguity in the "WHEREAS" clause which stated that the parties "have had certain differences" arising from the dealership termination, and that they "now desire to settle those differences." The Court below read the clause as limiting the scope of the agreement to "those differences" and reasoned that if it could not be determined from the face of the document what "those differences" were, the intent of the parties presented a factual issue for the jury.

If the agreement purported to be a special release, and not a general one, such a construction might be appropriate. But the very nature of a general release is that the parties desire to settle all matters forever. A general release such as we have here not only settles enumerated specific differences, but claims "of every

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Equipment Agreement, or its cancellation, including, without limitation, the cancellation of all outstanding purchase orders, which orders Impression Products hereby withdraws.

3. SCM hereby releases, quit claims and discharges Impression Products, its successors and assigns, from any claim (including without limitation all claims for amounts due on material delivered by SCM to Impression Products), demands, cause of action, and liability of every kind of character, known and unknown, now existing or which may hereafter arise from the Equipment Agreement, or its cancellation, except as provided in Section 4 below.

4. This settlement is based on the assumption that Impression Products will pay promptly at maturity each of its notes delivered to SCM pursuant to Section 1 above and for that reason Impression Products has been given by SCM a $5,022 credit on its purchases, which represents credit of the 7% discount usually allowed only for 10-day payment; accordingly, if Impression Products defaults in the prompt payment at maturity of any such note, Impression Products shall immediately forfeit the $5,022 credit and such amount shall immediately become due and payable hereunder to SCM by Impression Products.

5. This Agreement shall be governed by Virginia law.

IN WITNESS WHEREOF, each of the parties has caused these presents to be signed in its name and on its behalf by its President or Vice President, attested by its Secretary or an Assistant Secretary, both being thereto duly authorized, [sic] all as of the 15th day of September, 1964.

kind or character, known and unknown." Compare *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, (S.D.N.Y. 1955).

A release is just another contract in which the intent of the parties is to be derived from the face of the instrument viewed as a whole. See *Warrie v. Boze*, 191 Va. 916, 62 S.E.2d 876, 880 (1951). Viewing the settlement agreement as a whole, the intent of the parties to agree to mutual general releases is clear. It is significant, we think, that the release agreement recites that the specific "differences" are "in regard to and growing out of" termination of the very dealership agreement now said to have been unlawful and in violation of the antitrust laws. It is true Paragraph one sets out the terms of the agreement on accounts. Had the parties intended to limit their agreement to financial matters there recited they could have stopped there. Instead they went further. The broad language of a general release was included in the context of settling termination of the very Equipment Dealer agreement which is now the basis for claimed antitrust law violations. In such a context we must give effect to the plain meaning of words. *W. F. Magann Corp. v. Virginia-Carolina Electrical Works, Inc.*, 203 Va. 259, 123 S.E.2d 377, 380-81 (1962); *William Schluderberg-T. J. Kurdle Co. v. Trice*, 198 Va. 85, 92 S.E.2d 374, 377 (1956). See also, *Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp.*, 311 F.2d 389, 394 (4th Cir. 1962).

We think there was no jury issue as to mutual mistake, fraud, or misrepresentation. It was clearly established at the trial that Mr. Sexton of SCM's legal department clearly desired a general release, and communicated that desire to Freeman in Richmond. There is no evidence that he ever desired anything less. For a mutual mistake to vitiate the effect of this release, both parties must have intended not to include a general release in the settlement agreement. *Marshall v. Cundiff*, ____ Va. ____, 180 S.E.2d 229, 232 (1971). Unilateral mistake is not enough. See *DeHart v. Richfield Oil Corp.*, 395 F.2d 345, 348 (9th Cir. 1968).

Nor can we discern any evidence whatsoever of fraud or misrepresentation of a material fact. VIP points to Sexton's desire, which was not expressed to Redman, that a general release be obtained to avoid possible antitrust litigation. The law imposes no obligation on a party to a general release, dealing at arms length, to reveal all the possible legal theories that the other may possibly use against him. The law merely requires one to reveal material facts if they are unknown to the others. *Clay v. Butler*, 132 Va. 464, 112 S.E. 697, 700 (1922). Redman was not "acting under a mistake as to undisclosed material facts," Restatement of Contracts § 472(1)(b) (1932), when he signed the agreement because he knew as well as Sexton all the material facts.[3] At most he simply failed to appreciate their significance, and failed to consult a lawyer, a dereliction not chargeable to SCM. He was not misled and indeed was encouraged by Mr. Freeman to consult his lawyer before signing the agreement.[4] Neither VIP's failure to appreciate

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3. Significantly SCM never concealed its reason for dealership termination or pretended a fictitious one. Presumably VIP could as well have concluded at the time of signing the settlement agreement as subsequently that it was terminated "because it had sold machines to a non-user in violation of its territorial agreement and to a competitive paper seller . . ." Brief for Appellee at 16.

4. Freeman encouraged Redman to seek legal advice when he submitted the proposed settlement agreement for his consideration.

September 11, 1964

Dear Mr. Redman:

In accordance with our recent conversations regarding settlement of your controversy with SCM Corporation, I enclose 4 copies of the Settlement Agreement. *After you have reviewed it with your counsel, as you have indicated you would like to do, if he has any questions, I would be delighted to consult with him.* If you find the Agreement in order, would you please execute two copies and return them to me. I will then forward them promptly to SCM Corporation for execution and upon their return to me we could effect the settlement here in our office.

* * * *

If I could receive your comments or the Agreement on Tuesday or Wednesday of next week we would be able to have the final settlement during the week of the 21st.

Sincerely yours,

George G. Freeman, Jr.

(emphasis added)

the significance of the known facts, nor Redman's lack of expertise in the antitrust laws is sufficient to excuse VIP's compliance with the terms of the release. See, *Corbett v. Bonney*, 202 Va. 933, 121 S.E.2d 476, 481 (1961).

Since there were no questions of fact to be submitted to the jury, the construction of the contract was for the court. Its meaning is clear, and we find no prohibition in the statutes or in the policy behind the antitrust laws that prohibits the disclaimer of antitrust claims by a general release. Although private enforcement is a hallmark of the antitrust laws, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321, 336 (1971), it is not mandatory and federal policy does not prohibit agreements among private individuals releasing such claims.

> While the federal policy of jealously regarding the rights of private antitrust claimants should not as a matter of law preclude their being able to release claims—*even unknown claims*—nor protect them, after-the-fact, from their conscious though unwise action, we think it does allow—and is supported by—a rule which requires the court to determine that they *knew and intended* that the release cover all that it is being held to cover.

Novak v. General Electric Corp., 282 F. Supp. 1010, 1023 (E.D. Pa. 1967) (first emphasis added).[5]

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5. In *Novak*, Judge Higginbotham noted that
> Mere shorthand references such as "general release" are not in themselves sufficient. Nor do I think that ritualistic incantations . . . are sufficient to deprive one of unknown antitrust claims. It is not too much to require the conspicuous insertion of a phrase stating that the release covers, for example, "all claims, whether presently known, or unknown, suspected or unsuspected, arising out of the same or of different product lines as are here involved and whether related or unrelated to the present dispute as to law or facts or both," before we hold that *as a matter of law*, the parties *must* have intended to cover a prior unknown and unrelated claim.

Novak v. General Electric Corp., 282 F. Supp. 1010, 1023 n. 44 (E.D. Pa. 1967). *See also*, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U. S. 321, 342-43 n. 10 (1971). Compare the language in paragraph 2

Because we conclude that, as a matter of law, the settlement agreement expresses the intent of the parties to grant mutual general releases, the verdict rendered below will be vacated, and the complaint dismissed.

Reversed.

WINTER, Circuit Judge, dissenting:

Because I cannot conclude that, as a matter of law, the Settlement Agreement (release) executed by VIP barred the antitrust cause of action it sought to assert against SCM, I must respectfully dissent. In my view, the Court should conclude that whether the release constituted a bar was an issue properly submitted to the jury and should proceed to decide the myriad other issues that the appeals present.

My brother Craven has set forth the terms of the release. It recited that "[w]hereas" the parties have had "certain differences in regard to and growing out of the termination . . . of their Office Equipment Dealer Contract" and that they "desire to settle *those* differences," (emphasis added) and, "[t]herefore," VIP released SCM "from any claim, demand, cause of action, and liability of every kind or character, known and unknown, now existing or which may hereafter arise from the Equipment Agreement, or its cancellation. . . ." The form of the agreement is that of a syllogism but its conclusion is a *non sequitur* because, manifestly, parties do not release and settle *certain* designated differences by releasing and settling *unknown* claims "now existing or which may *hereafter arise*."[1] Both from the language

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of the VIP-SCM settlement agreement, *supra* note 2, which is equally explicit under the facts before us. Such a requirement, as Judge Higginbotham would impose on the release of antitrust claims, appears consistent with Virginia's construction of general releases. *See,* Smith v. Hensley, 202 Va. 700, 119 S.E.2d 332, 334 (1961).

1. My conclusion would readily be to the contrary if the parties had recited in the whereas clause that they desired to settle certain differences between them as well as "any other differences of like or different nature, known or unknown, now existing or which may hereafter arise," or words of like import.

employed and applicable authorities, I conclude that there was an ambiguity on the face of the instrument. Under the law of Virginia, the jurisdiction in which the document was executed and delivered and to which it relates, an ambiguity renders the question of whether the release should be given the effect of releasing SCM from the latter's substantial antitrust violations one for the jury after an evidentiary exploration of what the parties intended and after proper instructions from the court.[2] *Greater Richmond Civic Recreation, Inc. v. A. H. Ewing's Sons,* 200 Va. 593, 106 S.E. 2d 595 (1959); *Geoghegan Sons & Co. v. Arbuckle Bros.,* 139 Va. 92, 123 S.E. 387, 389 (1924) (dictum).

My conclusion that the release was sufficiently ambiguous that a reasonable jury could construe it not to be a bar here is supported by the widely-accepted commonlaw principle that general releases are to be construed narrowly. Williston states that "[a] release, although general in terms, will be reformed so as to cover merely the right with regard to which the parties were dealing and exclude rights of which they were ignorant." 13 *Contracts* § 1551 at 188-89 (3rd ed. 1970). Virginia probably would not go as far as Williston in this direction, see *Marshall v. Cundiff,* ..... Va. ....., 180 S.E.2d 229 (1971), in which a release which unambiguously and emphatically covered known and unknown injuries without listing specific ones, was held effective to bar subsequently discovered injuries. But in dealing with less clear and sweeping releases, Virginia has allowed its

2. I hasten to add that I do not undertake to decide the antitrust issues in these appeals. Neither the majority nor I reaches them in view of the majority's decision with respect to the efficacy of the release. I refer only to the related case of *Advance Business System & Supply Co. v. SCM Corp.,* 415 F.2d 55 (4 Cir. 1969), in which SCM's methods of doing business in Maryland, which were similar to the methods pursued in Virginia, were found to be in substantial violation of the antitrust laws.

juries considerable leeway in adopting narrow constructions. See *e.g., Smith v. Hensley,* 202 Va. 700, 119 S.E.2d 332 (1961).[3] There, Hensley was a franchised dealer in Smith's "Cool Roof" roofing products. Hensley went out of business at a time when he was indebted to Smith for materials purchased. As part of the settlement of the debt, Hensley gave Smith a check on which it was noted that it was "[i]n full settlement, notes, secured by deed of trust, Cool roof matters, and all other differences." At a later date, apparently Hensley was successfully sued by users of defendant's products which had discolored and cracked. Hensley then sued to obtain reimbursement from Smith, and Smith pleaded the notation on the check as a release of the cause of action sought to be asserted. The court rejected this defense, saying:

> . . . There is no merit in the appellants' contention that the notation on the $1,000 check barred the appellee's right as a matter of law to bring this suit. The undisputed evidence shows that the check was given to the appellants pursuant to an agreement between the parties to settle the appellee's indebtedness, and that the notation made on the check was for the purpose of relieving him of the duty to adjust future complaints arising out of the sale and application of the Stay Cool products. The settlement agreement brought to an end the dealership arrangement between the parties and all materials and equipment on hand were returned to the appellant. The evidence shows that it was not within the contemplation and intention of the parties that the notation on the check was to relieve the appellant from liability arising out of the sale to him of the Cool Roof products. For a release to be final and complete it must have been so intended by the parties. The evidence presented a factual situation for determination by the jury.

3. Resort to Virginia law at least impliedly suggests that it determines resolution of the issue of the effect to be given to the release. Although Virginia law is obviously important there are federal considerations arising out of the fact that a federal cause of action, i.e., violation of the federal antitrust laws is sought to be asserted. This point will be more fully developed in the text, *infra.*

119 S.E.2d at 335. See also, *Mercury Ins. Co. v. Griffith,* 178 Va. 9, 20, 16 S.E.2d 312, 316 (1941).

Similar cases from other jurisdictions include *Vines v. General Outdoor Advertising Co.,* 171 F.2d 487 (2 Cir. 1948), and *Walder v. Paramount Publix Corp.,* 132 F.S. 912 (S.D.N.Y. 1955). In *Vines,* a salesman of outdoor advertising sued his former employer for compensation for services rendered by him. His employment contract provided that he would be paid on a commission basis. The contract also provided that the assignment of accounts to him for solicitation might be withdrawn by the employer at any time prior to an actual sale, in which event his right to compensation for work on the withdrawn accounts would cease. The plaintiff claimed, however, that the withdrawal of one of his accounts, that of Liebmann Breweries, was pursuant to a contract between his employer and Outdoor Advertising Company, Inc., which had been declared to be in violation of the antitrust laws. Plaintiff further alleged that he did not know of these facts until after his suit for compensation had been instituted. He claimed damages under the antitrust laws.

As a defense, the defendant pleaded a written release of "all claims and demands of any kind whatsoever to the date hereof, and particularly . . . any claims or demands for salary, commissions or other compensation under any employment or contract of employment. . . ." The district court dismissed the complaint, but the Second Circuit (per Learned Hand, J.) reversed, saying:

> Although the plaintiff says that on April 8th, 1941, he did not know that the transfer of the Liebmann Breweries had been made in pursuance of an illegal contract between the defendant and Outdoor Advertising Co., Inc., that ignorance might not alone be enough to avoid the release, had it contained only the general words. Moreover, the fact that words of general import were followed by particular instances, did not inexorably leave no scope to the words of general import. In releases, as elsewhere, the intent of the

> parties is to be gathered from the instrument as a whole. Nevertheless, the courts of New York accept the common law doctrine that in a release words of general import, followed or preceded by words relating to specific claims are, ceteris paribus, limited to the specific claims. For the present, we need say no more than that the release of April 8th, 1941, did not inevitably release claims which the plaintiff might have under the Anti-Trust Acts, of which he was ignorant at the time. (footnotes eliminated.)

171 F.2d at 492.

In *Walder*, a case strikingly similar to the one before us, the former owners of a motion picture theater sued a motion picture distributor for treble damages and an injunction under the anti-trust laws; and the distributor asserted as a defense a release governed by Florida law. The court held the release legally insufficient to support summary judgment for the distributor. The essential terms of the release and the court's holding appear from the following:

> There are general clauses in the release sufficiently broad to bar the plaintiffs' present claims. However, the first "whereas" clause suggests a narrower scope. It states that the parties have had dealings and transactions relating to the "Tivoli Theatre and its equipment" and that disputes have arisen "with reference thereto and otherwise." The defendants, in addition to the general clauses rely on the words "and otherwise", but the "whereas" clause read as a whole appears to imply a more limited scope than that for which they contend. Whether the release was limited to the claims relating to equipment and repairs or was sufficiently broad to encompass all claims arising out of the operation of the theatre including antitrust violations, is not altogether clear from the face of the document. In view of this ambiguity the intention of the parties becomes relevant. Thus a substantial issue of fact exists which requires the denial of the motion for summary judgment. (footnotes eliminated.)

132 F.S. 916-917. See also, *Clarke Bariden, Inc. v. Merrit-Chapman & Scott Corp.*, 311 F.2d 389, 394 (4 Cir. 1962) (dictum).

There is another reason to treat the release as ambiguous and to allow the jury to consider extrinsic evidence of its scope. The antitrust cause of action that VIP has sought to assert is a creation of federal law. It is Congressional policy to rely heavily upon the private attorney general concept for enforcement of the antitrust laws. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 336 (1971); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317-318 (1965). There is some authority indicating that in view of this federal policy, federal law should wholly displace state law governing release of antitrust claims. In *Zenith, supra,* the Court assumed that the question of whether the release of one antitrust defendant released his coconspirators was a matter to be determined without reference to a particular state's rules on releases. See also, *Dice v. Akron, Canton & Youngstown RR Co.*, 342 U.S. 359 (1952) (federal law held to govern releases of claims under the F.E.L.A.). However, none of the authorities holds that federal law must be applied to govern the applicability of an antitrust release to the parties to the release where, as here, the parties contracted with reference to state law. But even if state law is not wholly displaced, federal policy has some bearing on the question. If the state law governing releases were antagnostic to the effective enforcement of private antitrust claims, for example, the interposition of a federal rule might be appropriate. See *United States v. Yazell*, 382 U.S. 341, 352 (1966) (state interests "should be overriden by the federal court only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."); *Novak v. General Electric Corp.*, 282 F.S. 1010 (E.D.Pa. 1967) (dictum). Similarly, where, as here, the effect of state law is subject to some dispute, an

interpretation of state law should be chosen which is not inimical to federal policy. Here, the federal policy in favor of private enforcement of the antitrust laws supports permitting the jury to consider extrinsic evidence and to construe the release narrowly. See, *e.g.*, Judge Higginbotham's highly persuasive opinion in *Novak, supra:*

> While the federal policy of jealously regarding the rights of private antitrust claimants should not as a matter of law preclude their being able to release claims—even unknown claims—nor protect them, after-the-fact, from their conscious though unwise action, we think it does allow—and is supported by—a rule which requires the court to determine that they *knew and intended* that the release cover all that it is being held to cover.[44] The question of the parties' intent as to the scope of the release is one of fact not readily ascertained on a motion for summary judgment; but which should be determined by the trier of fact after a full hearing. (emphasis in original.)

282 F.S. at p. 1023.[4]

Vines and *Walder, supra,* are additional support for *Novak* because, although federal policy was not an articulated basis of decision, in each of these two cases, the court looked behind broad language of release to hold that an antitrust claim was not released as a matter of law.

If I am correct that the jury was correctly permitted to consider the evidence of the intention of the parties, there is an ample

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4. It should be noted that the quoted extract contains footnote 44, the text of which is set forth as footnote 5 in the majority opinion in the instant case. While the majority apparently deems the language of the release in the instant case as equally explicit as that which Judge Higginbotham indicated he would permit to operate according to its terms, I submit that it is not. In the instant case, the ambiguity arises because of the recitation of intention to settle certain designated differences followed by undesignated unknown and future claims. This inconsistency was conspicuously absent in Judge Higginbotham's case, and hence I cannot read Judge Higginbotham to indicate that he would enforce literally the operative releasing language of the release in this case so as to preclude assertion of the antitrust claim.

record from which the jury could conclude that there was no mutual intention to release VIP's alleged antitrust claim.[5] Unilateral mistake may be insufficient to avoid a contract where the language in the contract is unambiguous; but where the contract language is not clear, the absence of mutual agreement simply results in the conclusion that there was no contract. 3 Corbin on *Contracts* § 538, at 64-65 (1960). Moreover, the record provides an adequate explanation of what the parties mutually intended to release when they agreed to release unknown claims now existing or which may hereafter arise, so that a jury could give effect to all of the language of the release without concluding that it constituted a release of the antitrust claim or without rendering it meaningless.

Briefly stated, the record shows this: SCM intended to obtain a release of its antitrust liability. VIP did not know, and did not realize until well after the release was executed, that SCM's motive for terminating the dealership contract was its desire to enforce territorial restrictions. Hence, it could well be concluded that VIP had no intention of releasing its antitrust claim because it was not aware that it had the claim at the time that it executed the release.

On the other hand, VIP did intend to release some unknown claims. Under the equipment dealer contract, VIP was entitled to a commission on the sale of every SCM machine to be *used* in its territory, although purchased elsewhere, and, conversely, it was obliged to split commissions on SCM's machines which it sold but which were intended to be used outside of its territory. More importantly, it was obliged to honor warranties on all SCM machines *used* in its territory and not just those which it sold. Thus, at the time of settlement there may well have been unknown claims for commissions or under warranties, or even for parts sold

5. I leave aside SCM's contention that the jury was not fairly or properly charged on this issue.

or repair work performed, presently in existence or thereafter to arise. These, it seems to me, are what were intended to be given up and not the antitrust claim, unknown to VIP, which SCM feared, but artfully refrained from making explicit when its counsel drafted the release.

Appendix B

United States Court of Appeals
For the Fourth Circuit

No. 15,041

Virginia Impression
Products Co., Inc.,

Appellant,

versus

SCM Corporation,

Appellee.

No. 15,042

Virginia Impression
Products Co., Inc.,

Appellee,

versus

SCM Corporation,

Appellant.

ORDER

The petition for rehearing is denied. The suggestion for rehearing en banc is rejected, no judge having requested the court be polled. Judge Winter adheres to his dissenting viewpoint.

s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge

Filed Oct 18 1971
Samuel W. Phillips, Clerk

Appendix C

1. *Cases Applying State Law:*

Eagle Lion Films v. Loew's, Inc., 219 F.2d 196 (2d Cir. 1955) (applying New York law to agreement stating it was to be governed by New York law on question of whether release of one joint tort feasor is release of all); *Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950) (assuming California law to be applicable to question of whether unknown antitrust claims are included within general release); *The Southern New England Distributing Corp. v. Admiral Corp.*, 1965 Trade Reg. Rep., ¶ 71,471 (D. Conn. 1965) (applying Illinois law in accordance with provision of agreement in determining the scope of the agreement); *Solar Electric Corp. v. General Electric Co.*, 156 F. Supp. 51, (W.D. Pa. 1957) (expressly applying Pennsylvania law to question of whether release of one joint tort feasor is release of all); *Walder v. Paramount Publix Corp.*, 132 F.Supp. 912 (S.D.N.Y. 1955) (apparently applying Florida law to determine scope of release); *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948) (applying New York law to construe release containing general language followed by specific language as "not inevitably releas(ing) claims which the plaintiff might have under the Anti-trust Acts, of which he was ignorant at the time.").

2. *Cases Applying Federal Law:*

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795 (1971); *Miami Parts & Spring, Inc. v. Champion Spark Plug Co.*, 402 F.2d 83 (5th Cir. 1968) (following *Winchester* and applying federal law to question of whether release of one joint tortfeasor is release of all); *Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theater,*

351 F.2d 925 (9th Cir. 1965) (holding that federal law applies to question of whether the release of one co-conspirator which did not expressly reserve rights against other co-conspirators releases all co-conspirators); *Mustang Oil Co., Inc. v. Crown Central Petroleum Co.*, 1971 Trade Reg. Rep. ¶ 73,657 (W.D.N.C. 1971) (following *Zenith* and applying federal law to question of whether release of one co-conspirator is release of all); *Green v. Aerosol Research Company*, 286 F.Supp. 627 (N.D. Ill. 1968) (apparently applying federal law in determining scope of release agreement); *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 198 F.Supp. 638 (S.D.N.Y. 1961) (applies federal law to question of whether a document was a covenant-not-to sue or a release); *Taxin v. Food Fair Stores, Inc.* 197 F.Supp. 827 (E.D.Pa. 1961) (holding that federal law supersedes state law on question of whether releasing party must tender consideration received as a prerequisite to action to avoid the release on grounds of fraud); *Taxin v. Food Fair Stores, Inc.*, 181 F.Supp. 181 (E.D.Pa., 1960) (apparently applying federal law to question of whether release was fraudulently obtained).

3. *Cases Not Specifying the Applicable Law:*

Fabert Motors, Inc. v. Ford Motor Co., 365 F.2d 888 (7th Cir. 1966) (unclear what law was applied in determining scope of release); *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F.2d 5 (3rd Cir. 1957) (declining to decide whether federal, New Jersey or common law applies to question of whether release of joint tortfeasor is release of all, since result is same under any law); *Duffy Theaters Inc. v. Griffith Consolidated Theaters*, 208 F.2d 316 (10th Cir. 1953) (not expressly deciding whether federal or state law applies, although citing both, in holding that release of antitrust claims is not against public policy); *S. E. Rondon Co. v. Atlantic Richfield Company*, 288 F.Supp. 879 (C.D.

Cal. 1968) (unclear what law is applied in determining whether method of and reason for obtaining release agreement were against public policy); *Ayers v. Pastime Amusement Co.*, 240 F.Supp. 811 (E.D.S.C. 1965) (silent on applicable law to question of whether release of one joint tortfeasor is release of all); *Lawrence Capitol v. Stanley Warner Corp.*, 152 F.Supp. 889 (D. Mass. 1957) (unclear what law was applied in determining whether release of antitrust claim was obtained by fraud); *Michael Rose Productions v. Loew's Inc.*, 143 F.Supp. 606 (S.D.N.Y. 1956) (applicable law unclear, but apparently relying on New York decisions in finding that ". . . it is clear that the plaintiff in the case at bar has the right to present evidence tending to establish the following propositions:

* * * *

6". . . that the plaintiff did not intend to discharge the antitrust claim when it executed the release, but that defendants did attempt to include that claim in the release and that defendants concealed their own intention from plaintiff, knowing that plaintiff's understanding of the contents and effect of the release was that it embraced only the pending New York Supreme Court action."); *Michael Rose Productions v. Loew's Inc.*, 141 F.Supp. 257 (S.D.N.Y. 1956) (silent on applicable law to question of whether release should be reformed on grounds of mutual mistake); *Rector v. Warner Brothers Pictures*, 102 F.Supp. 263 (S.D. Cal. 1952) (unclear what law is applied to question of whether agreement was a covenant not to sue or a release).

4. *Cases applying State Law in Furtherance of Federal Policy:*

Novak v. General Electric Corp., 282 F. Supp. 1010 (E.D. Pa. 1967) (after finding it not in contravention of Federal policy, New Jersey law is applied to determine intention of the parties from all the facts and circumstances as well as the totality of the documents).

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-713

VIRGINIA IMPRESSION PRODUCTS CO., INC.,

Petitioner,

against

SCM CORPORATION,

Respondent.

RESPONDENT SCM'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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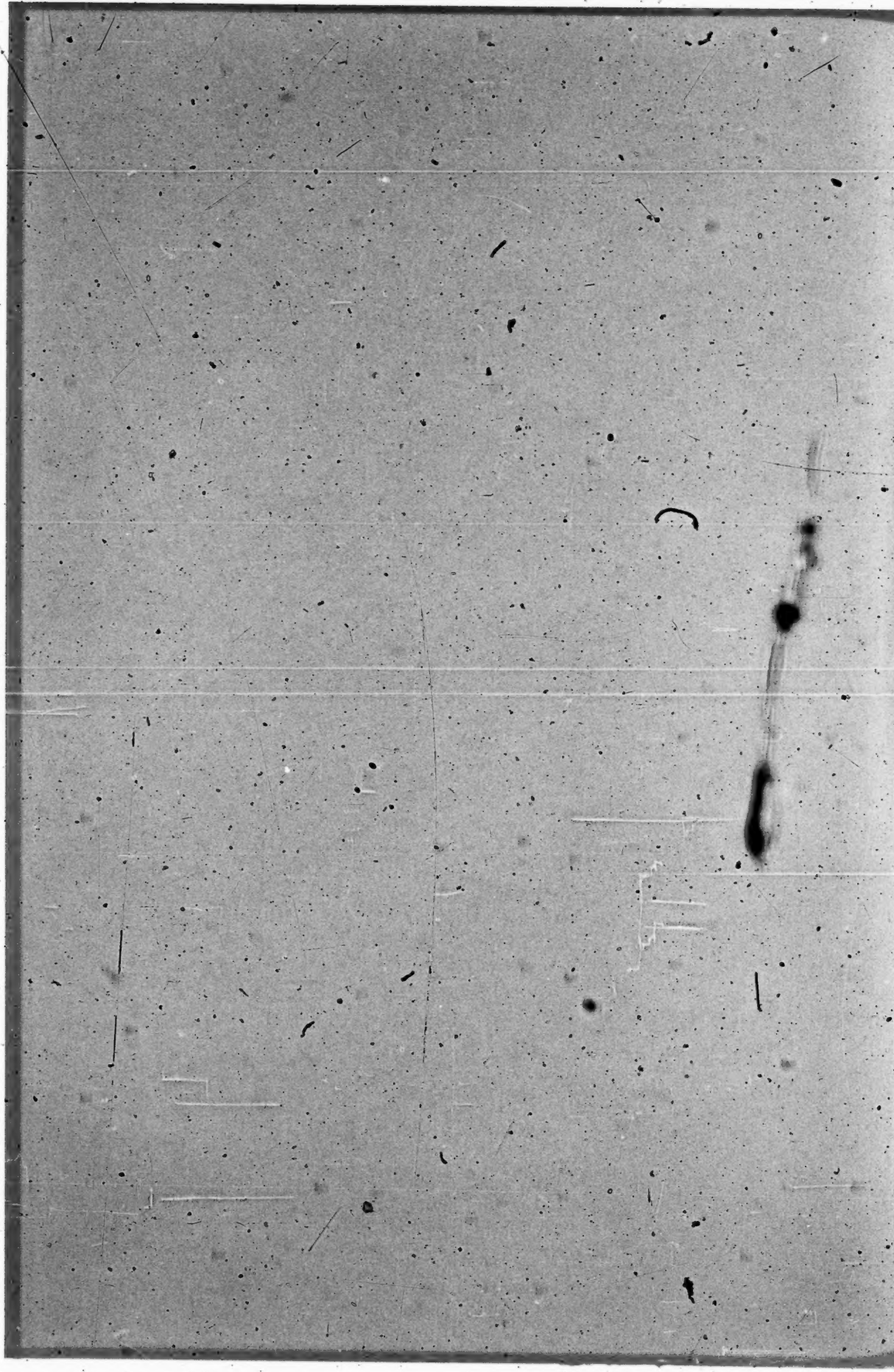

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-713

VIRGINIA IMPRESSION PRODUCTS CO., INC.,

Petitioner,

against

SCM CORPORATION,

Respondent.

RESPONDENT SCM'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Further review of the decision of the court below rejecting petitioner's Settlement Agreement and release contentions is not warranted. The court below carefully reviewed the record, identified the relevant undisputed facts and applied to those facts uniformly accepted legal principles as to which there is no conflict or confusion. It reached the just and proper result on the facts presented, including the parties' contemporaneous written agreement and expression of intent. The decision below has no impact beyond the specific negotiated transaction between the two parties involved.

The issue of whether federal law governs in resolving this specific case has no significance because no showing has been or can be made that the result would be any different from that reached by the court below. In-

deed, the court below did not hold that state law was applicable but instead relied on all sources, including relevant forum state and federal decisions; and it considered federal antitrust policy. The parties in the court below extensively briefed the facts and law, and petitioner's written and oral arguments relied heavily on forum state law. Petitioner raised for the first time its contentions concerning federal law in its petition for rehearing. The court below denied that petition, properly rejecting such contentions without further discussion.

Review of the dismissal of the petitioner's post-release claim for damages of about $5,000 is not warranted. The petition's assertion that the court below dismissed that claim by *sub silentio* giving effect to the release as to post-release matters is an affront to this Court and the court below. The petition accurately states that respondent expressly conceded throughout the case that the release had no effect on any post-release matters; but the petition does not inform this Court of the salient facts upon which respondent did urge dismissal of such post-release claim: that prior to the submission of the case to the jury, petitioner expressly conceded that it failed to prove clearly its post-release damage claim; and that petitioner then proceeded expressly to abandon that claim. We set forth those facts from the record at pages 13-15 below.

Thus, it is no wonder that petitioner's abandoned claim was disposed of by the court below without discussion in its opinions or denial of rehearing. Indeed, not a single judge requested that the court be polled when, in its petition for rehearing and suggestion for hearing *en banc*, the petitioner for the first time made the argument it now advances. In short, there is no issue here whether a release was given effect with respect to any post-release matters.

Questions Presented

Whether the court below erred in deciding that in the facts and circumstances involved a written Settlement Agreement containing mutual releases, one of which was a release by a dealer to a manufacturer of all claims of every kind or character known and unknown arising from the cancellation of the dealership agreement, barred the dealer's claim that such cancellation violated the antitrust laws.

Whether the court below erred in dismissing the complaint insofar as it related to the dealer's claim of post-Settlement Agreement antitrust violation where, among other things, the dealer admitted unclear proof of damages and expressly abandoned that claim before the case was submitted to the jury.

Statement of the Case

The Issues Decided by the Court Below

In its opinion (P. App. 1-8*), the majority of the court below held that the release given by petitioner (VIP) to respondent (SCM), contained in paragraph 2 of the Settlement Agreement, from all claims of "every kind or character, known and unknown, arising from [the dealership agreement] or its cancellation" (P. App. 3, fn. 2), barred VIP's claim against SCM that such cancellation violated the antitrust laws.

It reached that decision by carefully considering the record, identifying the material extrinsic facts leading up to the execution of the Settlement Agreement and concluding that there was no evidence of fraud, misrepresentation,

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* References are preceded by the following identifications: petitioner's Appendix (P. App.); the petition (Pet.); the Joint Appendix filed in the court below (JA); and exhibits marked by plaintiff VIP and defendant SCM (PX and DX).

concealment or mutual mistake; and by concluding that the Settlement Agreement including its mutual releases was clear and unambiguous on its face as a contemporaneous written expression of the agreement and the intent of the parties to discharge any and all claims of any kind or character, known and unknown, arising from the cancellation of the dealership agreement.* As the majority held, cancellation was the very act "which is now the basis for claimed antitrust law violations" (P. App. 5).

As shown by the first footnote in his opinion, the dissenting judge differed most narrowly: his conclusion that a jury issue was presented "would readily be to the contrary" if the operative release language contained in the body of the Settlement Agreement had also been contained in its preamble (P. App. 8). The majority considered that such repetition was unnecessary since it was plain, viewing the Settlement Agreement as a whole, that the parties did not intend to limit their agreement to specific differences, but rather "to settle all matters forever" relating to the dealership agreement and its cancellation (P. App. 4-5).

Thus, in the light of the court's disposition and as shown in the fifth footnote of the dissenting opinion (P. App. 15), it was unnecessary to reach the question of whether the jury was properly charged on the Settlement Agreement issues. The trial court itself observed during the course of its charge that it had "confused" the jury with some of its Settlement Agreement instructions (JA 83a). It also observed, shortly before the end of its charge on all issues, that it was sure the jury was "completely con-

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*Even if it had been held that VIP's release of SCM was ambiguous and required jury consideration, the case would have been remanded for a new trial on the court's holding that there was no evidence of fraud, misrepresentation, concealment or mutual mistake since the jury was instructed on those points. Contrary to petitioner's assertion (Pet. 7), those were issues raised by VIP from the outset of the case (JA 132a), which it continues to press here (Pet. 2-3, 10, 15, 16).

fused" (JA 111a). Nor was it necessary for the court below to reach the other issues raised on the appeal, some of which are described in the text and footnotes at pages 6, 8 and 9 below. As already noted, the court below did not discuss its disposition of VIP's abandoned post-release claim.

The Pertinent Facts Concerning VIP's Claim That Cancellation of the Dealership Agreement Violated the Antitrust Laws and the Decision Below that VIP's Release Barred that Claim

In the first place, to divert attention from the facts relating to the Settlement Agreement, VIP treats and intermingles without distinction the facts which relate to its pre-release claim that SCM's cancellation of its dealership violated the antitrust laws, and those which relate to its post-release claim that SCM engaged in alleged anti-competitive practices after the cancellation. In that regard, much of which is cited by VIP in its petition, including the decision of the same Court of Appeals in the *Advance* case,* (which did not involve a former SCM dealer or any issues relating to any of SCM's dealer policies), related only to VIP's abandoned post-release claim.

In the second place, we consider that VIP has misstated the facts relating to both its pre-release and post-release claims and to the Settlement Agreement. In view of the abandonment of the post-release claim, it is unnecessary for us to deal with the facts relating to that claim. However, so there be no misapprehension we note that SCM offered substantial evidence to support its vigorous denial that it engaged in any anti-competitive practices after cancellation of VIP's dealership. It is necessary to show accurately the facts and issues relating to VIP's pre-release claim of illegal cancellation of VIP's dealership, and the facts and issues relating to the Settlement Agreement, to which we now turn.

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* *Advance Business Systems and Supply Co.* v. *SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920.

During the period from 1962 to 1966, SCM and some 40 other manufacturers attempted to make and maintain entry in the photocopy business and to compete with Xerox, which was completely vertically integrated, which already dominated that business and whose market share dramatically increased from 25% in 1962 to 48% in 1964 and to 61% in 1966. (DX 62, DX 1796, JA 1104-11a.)

In the entire industry context, during that period SCM granted territorial exclusivity to its dealers such as VIP in the areas of their respective local operations. As shown by SCM's proffered but excluded evidence, the SCM dealer policies (the violation of which VIP claimed led to the dealership cancellation) were maintained in reliance upon the decisions of this Court and various courts of appeals, holding that policies of those types were lawful if reasonable on the particular facts in the industry involved.* (JA 1104-11a, 1167a, 1433-35a.)

In September, 1962 VIP became an SCM photocopy products dealer. The dealership agreement contained a

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* SCM appealed from the trial court's determination that the jury would not be permitted to consider the reasonableness of SCM's vertical dealer policies and from various holdings by the trial court which led to that conclusion. (JA 92-93a, 542a(1)-(2).) Such holdings included a determination that the 1967 decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 is not subject to an exception with respect to new entrants; and that *Schwinn* was to be retroactively applied to SCM's cancellation of VIP's dealership in 1964 without consideration of SCM's proffered evidence of its reliance on *White Motor Co.* v. *United States*, 372 U.S. 253, *Snap-On Tools Corporation* v. *Federal Trade Commission*, 321 F.2d 825 (7th Cir. 1963), *Sandura Co.* v. *Federal Trade Commission*, 339 F.2d 847 (6th Cir. 1964) and earlier decisions. As to non-retroactivity, SCM relied on the principles and authorities most recently summarized and applied by this Court in *Chevron Oil Company* v. *Huson*, —— U.S. ——, 40 U.S.L.W. 4023, 4026-27.

provision for cancellation by either party on ten days' notice, which SCM invoked 18 months later, in April, 1964. In the dealership agreement, SCM conferred on VIP exclusive rights to market SCM photocopy products in the Richmond, Virginia area, the local area of its office supply products business. (DX 953, DX 1101.)

VIP itself claimed that it was the largest independent photocopy dealer in that area. During and indeed after the period in which it was a dealer for SCM, VIP also enjoyed exclusive rights to market office supply products, including competitive photocopy products, for at least 13 other manufacturers. (DX 1152, DX 1634, JA 580a, 645-46a.)

VIP was owned and managed by a sophisticated businessman, its president, Donald Redman, who often consulted with its regularly retained attorney. (JA 643a-44a, 714-17a.) Redman was well aware of litigation and complaints to governmental authorities as tools for VIP.*

During its dealership, VIP's indebtedness to SCM often exceeded the credit line which SCM had extended to it when VIP secured the dealership; and there were continued disputes between them concerning the amount of VIP's indebtedness. On cancellation, VIP's indebtedness concededly was substantially in excess of its credit line. It was only learned in the discovery in this action that Redman had secured VIP's dealership in 1962 by supplying SCM with financial information which falsely overstated VIP's net

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* For example, in May 1964, a month after cancellation of its SCM dealership, and a few months before September 1964 when he executed the Settlement Agreement, Redman wrote to VIP's attorney suggesting the possibility that VIP threaten suit or lodge a complaint with the Department of Justice concerning an alleged misrepresentation by another photocopy manufacturer (DX 1120). One event leading to the VIP-SCM Settlement Agreement was VIP's threat in July 1964 to sue SCM (DX 1134; see text page 10, *infra*).

worth by ten times, and which substantially overstated its profits during the preceding two years. (DX 9, DX 127, DX 1793-1795, JA 350-51a, 702a, 710a.)

VIP made no attempt to show that it ever earned any profits on the SCM line*, and there was affirmative evidence of its disinterest in continuing as an SCM dealer. Before the dealership was cancelled, Redman expressed his dissatisfaction about doing business with SCM (DX 984, DX 988). Six weeks before that cancellation, Redman said that the SCM dealership was a "temporary expediency" for VIP; and that it "will be necessary in the next few week or months" for VIP to make a "break" with SCM (DX 1056). After cancellation, VIP made no inquiries concerning it and made no effort to regain the dealership (JA 626-28a).

VIP contended in the trial court and on appeal that SCM's reason or motivation for cancelling the dealership was VIP's violation of SCM's dealer territorial and alleged user limitations. SCM contended that the reasons or motivation for the cancellation were two-fold: because the credit difficulties with VIP had reached a head; and because VIP had been covertly transshipping SCM photocopy machines to S.O.S. and S.O.S. dealers. (JA 468-75a, 524a, 1467-69a.)

S.O.S. was an organization headquartered in California and led by ex-SCM photocopy executives, with whom SCM

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* In addition to SCM's claim in the trial court and on appeal that the jury was improperly permitted to consider VIP's wholly artificial claim for alleged lost profits, SCM also contended that VIP's damage theory involved duplicative elements: the jury was permitted to award both the alleged lost "going concern" or "good will" value of the dealership as of the date of its cancellation and the profits VIP claimed it would have earned in succeeding years (JA 104a). SCM relied on decisions in three different Courts of Appeals squarely holding those elements to be duplicative. The same decision was reached most recently in *Albrecht* v. *Herald Co.*, 1971 Trade Cases ¶ 73,754 (8th Cir. 1971).

was then engaged in bitter litigation. Prior to the cancellation of VIP's dealership, SCM had commenced in Illinois the first of a series of unfair competition actions against S.O.S. and various S.O.S. dealers, which ultimately in 1966 resulted in the entry of consent decrees enjoining various of the alleged unfair practices and dismissing with prejudice the antitrust claims S.O.S. had advanced. (DX 1281, DX 1642-1644, JA 1125-26a, all excluded.) In this action commenced by VIP in 1968, nearly four years after the Settlement Agreement, VIP's attorneys were the same attorneys which had represented S.O.S.

SCM sought but was not permitted by the trial court to show that, acting unilaterally, it was unwilling to sell its photocopy products to S.O.S., directly or indirectly, during a period in which SCM was willing to and did do business with other competitors; and that SCM cancelled VIP's dealership because of such unwillingness to do business with S.O.S. indirectly by selling to VIP.* (DX 1763, JA 524a, 1511a-17a.)

VIP had been covertly transshipping SCM products to S.O.S. and some of its dealers for about three months prior to the cancellation of its SCM dealership on April 8, 1964 (DX 1114-1116, JA 671-74a, 1064-65a). Among SCM's claims of unfair competition were its claims that certain S.O.S. dealers misrepresented that they were authorized SCM dealers in marketing and servicing SCM photocopy products, when in fact they were not and had acquired SCM

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* On the facts, and on the authority of *Emich Motors Corp.* v. *General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), cert. granted and modified on a different issue, 340 U.S. 558, and the decisions of other Courts of Appeal relating to the introduction of evidence to support contentions concerning motivation for dealer cancellations, SCM appealed from the trial court's rulings excluding SCM's proffered evidence and holding that the jury would not be permitted to consider SCM's contention.

photocopy machines by indirect means, and also palmed off S.O.S. photocopy paper as SCM paper.*

A few days after the cancellation (and some five months before the Settlement Agreement and release was executed by VIP), VIP formalized its relationship with S.O.S. and became its exclusive dealer in the Richmond area (DX 1073, DX 1634).

Three months later, in July 1964, while preliminary negotiations with SCM were going on, Redman threatened legal action against SCM if the parties' differences were not resolved quickly, without identifying the type of claim VIP might assert (DX 1134).

In August 1964, SCM engaged George C. Freeman, Jr., a member of the Richmond law firm of Hunton, Williams, Gay, Powell & Gibson, to consider and advise concerning the potential claims of SCM and VIP against each other, and on SCM's behalf to negotiate a written settlement agreement with VIP (DX 1674). SCM informed Freeman of the history of the previous negotiations and of the cancellation of VIP's dealership because of its dealings with S.O.S. and the credit difficulties. SCM also told Freeman of the then-pending litigation against S.O.S. and the S.O.S. antitrust claims. (JA 1254-55a.)

After reviewing the facts, Freeman advised SCM of the possibility that it possessed an unfair competition claim against VIP and that there was some risk of an antitrust action by VIP against SCM (JA 1281-82a). In this factual context SCM informed Freeman that it wanted the VIP matter "completely resolved", with mutual general releases by VIP and SCM in order to avoid litigation of any kind arising from the dealership agreement or its cancellation (JA 1255a, 1283-84a).

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* Bribery, kickbacks and misappropriation of confidential customer lists were other practices by S.O.S. and certain of its dealers which SCM alleged against them based on its knowledge and belief (DX 1642-1644 excluded).

Freeman then spoke with Redman, expressing the terms on which SCM was willing to settle—the financial arrangements and an exchange of general releases. Redman told Freeman that VIP had an attorney but refused to disclose his name. Freeman and Redman agreed that Freeman would draft a written agreement embodying those terms, which, as Freeman urged, would be submitted by Redman to VIP's attorney. Both orally and in writing (see Freeman's letter, DX 486, quoted in fn. 4 of the opinion of the court below), Freeman stated that if VIP's attorney had any questions he should discuss them with Freeman. (JA 1283-89a.)

Freeman's conduct in his communications with Redman met the highest standards of professional practice. Nevertheless, VIP continues to attack Freeman's conduct without a shred of justification. Instead of attempting to give Redman gratuitous legal advice which might be incomplete, misleading or erroneous, or which might deter Redman from discussing the matter fully with his own attorney, Freeman gave Redman the only advice he could give: that Redman see and consult his own attorney.

Some ten days after Freeman sent Redman the draft settlement agreement, Redman advised Freeman that it was in good order, and Redman executed it (JA 1286a). Redman testified in this action that he chose to enter into the agreement without consulting VIP's attorney, a fact which was not revealed to Freeman (JA 714a). If, as Redman testified, he decided not to consult VIP's attorney, that choice is consistent with a recognition by him at that time that the mutual releases in the Settlement Agreement accurately expressed his and VIP's intention to settle forever all known and unknown claims of any kind which VIP or SCM may have possessed against the other arising from the dealership agreement or its cancellation.

In support of its position in this action, VIP advanced Redman's objected-to oral testimony at trial that in his

mind five years earlier when he executed the Settlement Agreement he understood the release to reach only the prior financial differences between the parties, although he never conveyed that claimed understanding to SCM or anyone else. (JA 613a.)

The court below held that Freeman did not mislead Redman but properly encouraged him to consult VIP's lawyer and that Redman's failure to do so was "a dereliction not chargeable to SCM" (P. App. 6). The court held that there was no evidence of any fraud, misrepresentation or concealment; that there was no mutual mistake of fact and Redman knew as well as SCM all of the material facts; and that VIP's claimed failure to appreciate the significance of the known facts, whether because of Redman's dereliction or because of any claimed lack of expertise in the antitrust laws, was insufficient to avoid the release (P. App. 6-7). The court also held, relying upon *DeHart v. Richfield Oil Corp.*, 395 F.2d 345 (9th Cir. 1968), that the alleged unilateral intent of Redman, undisclosed to SCM, could not avoid the release (P. App. 5).*

There were two other holdings by the court below. The first was that reading as a whole the Settlement Agreement, including the release in paragraph 2, it was a clear and unambiguous expression of the agreement and intent of the parties to settle forever any and all kinds of known and unknown claims arising from the dealership agreement or its cancellation; and that it was not, as VIP claimed, an expression of agreement and intent to limit the mutual releases to the parties' financial differences (P.

---

* In the *DeHart* case, plaintiffs gave a general release to defendant in settlement of an antitrust action and thereafter sued on an alleged pre-release breach of contract claim. Without holding whether federal or state law governs, and drawing on relevant forum state (Washington) and federal decisions, the court affirmed summary judgment for defendant and held that there was no reason to allow oral testimony by plaintiffs-releasors of their claimed unilateral intent not to compromise the contract claim.

App. 4-5). The construction urged by VIP would not have explained an ambiguity, of which there was none, but would have contradicted and rewritten the express release of claims arising from the dealership agreement "or its cancellation" to a release of financial differences concerning VIP's account with SCM.

The second holding was that federal antitrust policy as most recently expressed by this Court in *Zenith* and as conceded by VIP in oral argument below, does not prevent effectuating, as between the parties, the terms of a plain release expressing the parties' agreement and intent, specifically negotiated at arms' length by two business enterprises, where there is no evidence of fraud, misrepresentation, concealment or mutual mistake (P. App. 7).

In order to weave the fabric of a purported policy argument that this case presents a generalized situation requiring a rule to "protect an unsophisticated victim of antitrust violations" (Pet. 16), VIP in its petition makes no reference whatsoever to the facts relating to Freeman's urging Redman to consult VIP's attorney, and Redman's decision not to do so. Instead, VIP utters the most astounding half-truth contained in the petition when it asserts that the application of rules giving binding effect to written agreements "lays traps for unwary plaintiffs, not represented by counsel, as was the case with petitioner prior to and when executing the release" (Pet. 15, fn. 34).

The Pertinent Facts Concerning VIP's Conceded Failure of Proof and Its Express Abandonment Of Its Post-Release Claim

VIP's counsel began his reply closing argument to the jury by conceding VIP's failure of proof as to its post-release claim that SCM engaged in anti-competitive practices, VIP's so-called "second case":

> "Let me start out by making a major concession in light of what Mr. Farley [SCM's trial counsel] has

> said. We really haven't been very clear in proving the damages in terms of the lost paper sales that Mr. Redman lost or suffered as a result of the so-called second case, or the attempts to compete with SCM after he was terminated because of what we have called anticompetitive practices:" (JA 1473a)

Indeed, even that was an understatement, since it was made in the light of Redman's admission on cross-examination that VIP had not suffered any lost business by reason of SCM's alleged post-release anticompetitive practices (JA 701a).

After making that major concession, VIP's counsel stated to the jury:

> "I suggest, ladies and gentlemen of the jury, that you do what I am going to do, and that is to focus on the real case here. That is the damages suffered by [VIP] by virtue of their illegal termination." (JA 1474a)

VIP's counsel then expressly and conclusively abandoned VIP's post-release claim near the end of this argument to the jury, when he stated:

> "As far as we are concerned you can forget that other, you know, the other tough problem about the anticompetitive things, the $5,000. That is peanuts." (JA 1482a)

On these facts, and SCM's position throughout the case that the release had no effect with respect to VIP's post-release claim, there was no holding by the court below, as VIP states, that the release was invoked *sub silentio* to discharge SCM from any post-release liability. Any discussion by the court below of VIP's contention advanced in its petition for rehearing and suggestion for hearing *en banc,* would have unnecessarily dignified it. The

renewal of that contention here with omission of the pertinent facts can be most charitably characterized as an abuse of the statutory privilege to seek certiorari review.

Argument

Since there is no issue as described by VIP arising from the disposition of VIP's post-release claim, our discussion here relates to the absence of any factor warranting further consideration by this Court of the decision below that VIP's pre-release claim concerning cancellation of the dealership was barred by the Settlement Agreement and release.

1. The court below applied familiar and well-established principles that the intent of the parties governs and that the unambiguous contemporaneous written expression of that intent shall be given effect. Apart from the plethora of state decisions decided on that basis, this and other federal courts have invoked and applied the same principles, particularly in the pre-*Erie* v. *Tompkins* period.

Thus, in *Simpson* v. *United States*, 172 U. S. 372, 379, this Court held that it "is too elementary to require anything but statement" that a party "cannot be heard to vary by parol its express and unambiguous stipulations" to impair the obligations which a contract engenders or to produce for that party a better monetary result. Similarly, in *Northern Assurance Co. of London* v. *Grand View Building Association*, 183 U.S. 308, 364, it was said:

> "It is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing and to the legal doctrine that protects them when so expressed, and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as

to conversations and negotiations that may have never taken place, or the real nature and meaning of which have faded from recollection."

See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 347, fn. 12 and the cases cited therein with approval. In the *Zenith* case, the Court in an antitrust action invoked the rule of effectuating the parties' intentions insofar as they related to the discharge of non-contracting third party joint tortfeasors.

There is simply no conflict or confusion concerning that rule of intention, or concerning the principles relating to the ascertainment of the parties' intentions by reference to the contemporaneous unambiguous written expression of the parties' agreement and intent.

2. As conceded by VIP (Pet. 13, fn. 32) many of the 24 cases it cites in its Appendix C concerning alleged confusion as to whether federal or state law should govern involved the divergence of views concerning the impact of releases on joint tortfeasors who were not parties to the release, the issue which this Court resolved in *Zenith*.

VIP also conceded the absence of any conflicting Courts of Appeals' decisions on the "precise question" of federal or state law which VIP says is raised by the decision of the court below (Pet. 13). There is no recurrent significance to this purported question. Only eight of the 24 cases cited by VIP in its Appendix C, all of which were antitrust cases, involved the question of the scope of a release as between the parties to that release. Whether federal or state law governs lacked any determinative significance because of the application in those cases of the same uniformly accepted principles applied here.

3. VIP cites a provision of the Settlement Agreement that Virginia law would govern, to support its mischarac-

terization that the court below held that Virginia law applied (Pet. 7, fn. 24a). The court below made no holding that either forum state or federal law should govern, just as no holding on that point was made in the *DeHart* case (see page 12, above) and many other cases including several cited by VIP, where the making of such a holding would have no determinative significance. While the court below drew for the most part from forum state law, as did all of the parties in their arguments below, it also drew, as did the parties, from relevant federal decisions. Its decision did not rest upon any principles as to which there is any controversy, but upon the specific facts.

VIP never asserted prior to its petition for rehearing that there exists any federal rule applicable here. It did not show then, and it does not show in its petition here, that a specific decision holding that federal law governs carries with it any different principle which would produce a different result on the facts presented.

This Court has held that it will not displace state law absent overriding "federal interests" or a need for a rule "uniform in character throughout the Nation." (*United States* v. *Yazell*, 382 U.S. 341, 352, 354.) On the specific fact pattern here, there is no overriding federal interest to displace any state law, since any such displacement would not produce any different result. Certainly, VIP does not show the absence of uniformity concerning any principles applicable here.

In short, there was no need here to make a specific holding of whether federal or state law governs, and the issue sought to be raised by VIP has no significance in the context presented. The court below properly recognized the need for scrutiny of a release which would bar an antitrust claim and at the same time recognized, as did *Zenith, Novak, Suckow* and other cases that, as VIP itself asserts, "amicable settlement and release of claims, including federal antitrust claims, is to be encouraged. . . ." (Pet. 10.)

4. In whatever way VIP attempts in its petition to disguise it, VIP's only quarrel is with the result adverse to it reached by the court below in applying familiar and well established principles to the specific facts presented. Because those principles have been enunciated for so long and so many times before, the decision below is not precedental and has no impact beyond the parties to this action.

The court below convincingly applied well established principles to reach the just and proper result. There is no basis for any further consideration by this Court of that decision.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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January 12, 1972.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 19 1972
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-713

VIRGINIA IMPRESSION PRODUCTS CO., INC.,

Petitioner,

vs.

SCM CORPORATION,

Respondent.

Reply Brief to Opposition to Petition for Writ of Certiorari

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SCM has carefully avoided responding to the merits of VIP's petition. Rather, it indulges in irrelevancies. For example, it argues innocence of antitrust violations although this issue is not before the Court; it spuriously suggests that VIP has attacked the integrity of attorney George Freeman of the Richmond law firm of Hunton, Williams, Gay, Powell and Gibson; and it erroneously asserts that the important federal questions raised by VIP's petition are contrived afterthoughts.

Speaking to the real issue, SCM urges that the issues posited by VIP's petition are not supported by the record. Precisely the contrary is true. Not only are the issues urged by VIP properly raised by the records and of pervasive importance to the fabric and policy of the antitrust laws but, moreover, SCM's failure

to challenge the undisputed facts dealing with the *real* intention of the parties (conceding as it does that VIP neither knew of nor intended to release its antitrust claims)[1] establishes the fallacy of SCM's assertion that application of the rule urged by VIP would not bring about a result ". . . any different from that reached by the court below."

I. The Issues Framed in the Petition Are Raised by the Record.

On the relevant issue, SCM's argument is this: while the intent of the parties is the determinative factor in ascertaining the scope of a release, that intent may only be determined by recourse to the four corners of the document. Thus SCM pays lip service to *Zenith* and to underlying federal policy while at the same time invoking 19th century parol evidence rules which would prevent consideration by the court or jury of the circumstances surrounding and leading up to the execution of the release or consideration of the parties' testimony as to what they truly intended. SCM is forced to take this anachronistic stand, since otherwise it cannot support the decision of the court below, which, in limiting itself to the four corners of the agreement, gave to the agreement a meaning contrary to the actual intent of the parties as demonstrated by the evidence and found by the jury under an instruction in which the specific issue framed was whether the *parties* intended to release the antitrust claims.[1a]

In all of its lengthy factual recital, SCM never denies the operative facts on which this general release was based:

(1) VIP did not intend to release any antitrust claim. SCM concedes this.[2]

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1. See footnote 2 and 3, infra.

1a. This instruction is set out in Appendix A to the brief.

2. "Redman, acting for VIP, said that he thought the release covered only the account dispute. (613a) This must be accepted as true for the purposes of this appeal." SCM Reply Brief in the Court of Appeals, p. 2.

(2) VIP did not know it had an antitrust claim. SCM concedes this.[3]

(3) In all the negotiations prior to the preparation of a draft agreement by SCM's counsel, all parties to the negotiations understood that they were settling the disputed commercial account items—and only those items—outstanding at the time of VIP's termination as an SCM dealer.[4]

(4) VIP could not have known it had an antitrust claim, since, as pointed out by the dissent in the court below, the most material fact which would give rise to that claim—the reason for its termination—was consciously concealed from VIP.[5] Even SCM admits that the only persons that knew of the possible antitrust claims were SCM's house counsel and SCM's drafting counsel.[6]

(5) House counsel in this context actively instructed its drafting counsel "not to specify the claims being released."[7]

In limiting itself to the four corners of the Agreement (from which it divined the intent of the parties) the majority of the court

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3. "From the record, and despite possible inferences to the contrary, it must be admitted for the purposes of this appeal that VIP has shown that it did not know of its potential antitrust claim against SCM when Redman executed the Settlement Agreement." SGM Reply Brief in the Court of Appeals, p. 2.

4. The factual background of the Settlement Agreement is summarized in Appendix B.

5. Contrary to the majority opinion below the reason for VIP's termination was both unknown by and misstated to VIP. Paragraph 10 of the dealer agreement provided for ten-day termination on written notice by either party. SCM's April 8, 1964 termination letter purported to terminate pursuant to Paragraph 10. (DX 1101, 54a) When Ruch directed SCM's Area Manager, Lett, to deliver the termination letter to VIP, Lett asked but was given no reason for the termination. (331a, 332a) This refusal was pursuant to SCM's policy not to give reasons for dealer terminations 1086a) Similarly, when Lett delivered the termination letter, he was asked the reason for termination. (333a, 602a) Lett would not say. (333a, 602a) Redman believed that VIP was terminating him pursuant to Paragraph 10. (626a, 628a, 629a)

6. SCM Reply Brief in the Court of Appeals, p. 3.

7. Freeman 1291a.

below disregarded all of the above facts, even though they clearly showed an intent different from that which the majority drew from the Agreement alone.

If, as VIP contends, the rule is that a party can only be held to have released those claims which he intended to release, the jury's decision must be affirmed.

As the dissenting judge below observed:

> "If I am correct that the jury was correctly permitted to consider the evidence of the intention of the parties, there is an ample record from which the jury could conclude that there was no mutual intention to release VIP's alleged antitrust claims."[8]

In an attempt to obscure the real issue, SCM falsely accuses VIP of launching a personal attack on Mr. Freeman. VIP has never questioned and does not now question Mr. Freeman's ethics or integrity in carrying out his clients' instructions. Rather what VIP complains of is SCM's concealment from VIP of the reasons for its termination; its concealment of possible antitrust violations from VIP during the negotiations carried on to settle outstanding commercial accounts; and its subsequent instructions to Mr. Freeman that in preparing an agreement reducing the settlement of these commercial accounts to writing he should include general release language without mentioning antitrust claims. The trial court noted that SCM's conduct was subject to question when it observed in chambers that:

> "a beautiful argument could be made that they [SCM] led this man [VIP's president] down the primrose path" by leading him to believe only the commercial accounts were being settled and later "slip[ping] that general release in on them. . . ." (RA Vol. XXXIX, 9)

II. The Release as Construed by the Court of Appeals Barred Post Release Antitrust Violations.

SCM now says that there is no issue of whether a release can bar a claim for damages caused by antitrust violations

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8. P.App. 14-15.

occurring after the release was signed, because of "failure of proof" and "express abandonment". The issues were raised and briefed in the Court of Appeals by both sides. They were not passed on by the Court of Appeals.

Despite the concession by SCM that the complaint alleges a post release claim and that the release did not cover post release claims,[8a] the Court of Appeals held:

> "Because we conclude that, as a matter of law, the settlement agreement expresses the intent of the parties to grant mutual general releases, the verdict rendered below will be vacated, and the complaint dismissed." (P.App. 8)

The majority thought SCM's position to be contrary to what SCM asserts here.

> "SCM posed a general settlement agreement between the parties as a defense, urging that it effectively released anti-trust claims as well as all others, and that VIP was barred from bringing the present action. We agree." (P.App. 1-2)

The Court of Appeals held that this release "as a matter of law" required the dismissal of the complaint including those allegations of post release violations.

III. The Issues Before This Court Were Raised at Trial and on Appeal.

SCM's argument that the contentions raised in VIP's Petition for Certiorari were raised for the first time in its petition for rehearing is not supported by the record.

The precise issue was first raised in a charge to the jury requested by plaintiff and given by the trial court which instructed the jury that the scope of a purported release must be determined by the intent of the parties after consideration of all of the evidence, and that a party cannot be held to release claims he did not intend to release.[9]

8a. Respondent's Brief in opposition, p. 2 and p. 5.

9. The instruction as given is presented at Appendix A to this brief.

Moreover, the issue of how a purported release of federal antitrust claims is to be construed was again raised in oral argument before the court below.[10] Within a week after the oral argument, and before decision by the court below, counsel for VIP by letter brought the then unpublished and recently decided decision in *Zenith Radio Corp. v. Hazeltine Research Inc.* to the lower court's attention as support for its contention. SCM responded by letter denying that *Zenith* had any applicability.

VIP urged the same position in its petition for rehearing, and has repeated its arguments in its petition to this Court.

IV. The Issues Presented Here Have Impact Beyond the Instant Case.

Contrary to SCM's assertion, the decision below has a far reaching impact on the private enforcement of the antitrust laws. It leaves unclear the question of whether every release interposed as a defense to federal antitrust claims is subject to the vagaries of state parol evidence rules. It would allow large and sophisticated companies to insulate themselves from liability for antitrust violations by extracting from their victims general releases of unknown antitrust claims under the pretext of settling commercial accounts. It undermines the federal policy encouraging private enforcement of the antitrust laws by allowing the release, not only of unknown antitrust claims, but of claims which could not have been known because the operative facts giving rise to the claim were concealed from the injured party. And it

10. There the senior judge on the panel asked counsel for VIP whether there was authority for treating the release of federal antitrust claims differently or whether antitrust claims could be released just as other claims. Counsel replied that although he knew of no specific authority, with respect to federal antitrust claims, it was VIP's contention that in view of the strong federal policy underlying private enforcement of the antitrust laws, there should be a rule that a party can be held to release only those claims which he intended to release.

holds that a general release can insulate a company from liability for *future* violations of the antitrust laws.

V. Conclusion.

For the foregoing reasons the petition for writ of certiorari should be granted.

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Virgina Impression
Products Co., Inc.

(Appendices Follow)

Appendix A

Charge to the Jury

Now, the document, dated September 15, 1964, is entitled "Settlement Agreement" and is signed by the officers of Virginia Impression Products and SCM.

Now, a purpose of the document, you will note from it as stated in its preamble, is to settle certain differences in regard to and growing out of the termination of Virginia Impression Products as an SCM photocopy dealer. There is a dispute, however, as to what "certain differences" the parties intended would be settled by the agreement.

SCM contends that the agreement was intended by the parties to settle a potential antitrust claim, such as this one. In other words, a general release to settle all claims, known or unknown.

Virginia Impression Products on the other hand contends that at the time it executed the agreement it didn't know of the existence of any antitrust claims and did not intend (55) that the agreement would settle any potential antitrust claims. Virginia Impression Products contends that the phrase "certain differences" that were to be settled by this agreement extended only to accounts owing SCM, unfulfilled orders placed by Virginia Impression Products, Virginia Impression Products' claims to discounts and commissions, and the matters of returning goods to SCM.

Now, I have allowed both parties to introduce evidence bearing on the meaning of the agreement so that you might determine. And it will be for you, the jury, to interpret the agreement by deciding what differences it was intended to settle.

Your primary job in this respect will be to ascertain the intent of the parties. To assist you I have allowed the parties to introduce evidence of their intent, including evidence as to the state of mind of the persons who were responsible for the negotiations and drafting of the agreement, as well as evidence of the cir-

cumstances surrounding its negotiations and drafting. You may consider all of this evidence in reaching your decision. The question for you to answer is this: Did Virginia Impression Products and SCM intend that the settlement agreement was to resolve, that the settlement agreement was to resolve, SCM's possible violations (56) of the antitrust laws? Now, unless you find that the parties intended by this agreement to include the release of antitrust claims against SCM you must find for the plaintiff, Virginia Impression Products, on this issue. And therefore you can put away the release and not have it affect you. Just because somebody doesn't know something doesn't mean you can't release it. You can release it if you intend to release everything. But if you intend to just release one thing, and that is for you to determine, what the intent of the parties were, both parties. (83a, 84a)

Appendix B

The negotiations were conducted in two stages. The first stage involved negotiations between VIP's president and certain SCM personnel and was concerned only with outstanding orders and accounts. After agreement was reached, SCM engaged local counsel to prepare a written agreement.

The following summary of the events preceding the preparation of the Agreement is offered to give the Court a better understanding of the factual context in which the Agreement was executed.

VIP was terminated effective April 20, 1964. (PX 1197) There followed a period of sporadic efforts by the parties to reconcile the amount actually owed SCM by VIP for past purchases of machines and supplies. SCM was demanding $34,464.00 (DX 1125) but VIP was asserting substantial credits.

From the very outset, "settlement" as used by the parties referred to, and only to, reconciliation of the account. On July 17, 1964, Kessler, SCM's credit manager, urged VIP to advise him "by return mail when we may expect settlement." (DX 1132) (emphasis added) Thereafter, on July 20, 1964, Redman wrote to Kessler as follows:

> Dear Mr. Kessler:
>
> It has been extremely burdensome to us and we know to you to reconcile our figures with yours in order to arrive at a final settlement.
>
> The attached facts are to be settled as you can see. If a sincere effort is made by SCM to correct our attached differences or a basis of adjustment is made, we will be most happy to cooperate as we wish to settle the matter as quickly as possible without taking legal action against one another. I am sure that you do not wish to attempt a settlement if it is wrong.

"We only wish to have each attached item resolved to mutual satisfaction. When this is accomplished we will arrange full settlement.

Sincerely,
Donald H. Redman, President
VIRGINIA IMPRESSION PRODUCTS., CO., INC.
(PX 1237)

Transmitted with the letter were summary sheets setting forth the "attached differences" (PX 1237) which hopefully could be "resolved to mutual satisfaction". The sheets were entitled "SCM Questionable Items" (listing disputed commission credits, disallowed discounts and other disputed accounting items); "Equipment and Supplies to be Returned to SCM", (listing various non-saleable merchandise on which VIP demanded a returned-goods credit), and "Other Matters to Be Settled With SCM" (consisting of five numbered items, principally relating to unfulfilled orders placed by VIP prior to its termination). (PX 1237)

Thus as of July 20, 1964, VIP was asserting the following deductions from SCM's claimed balance owing (copied verbatim from PX. 1237):

	Total both pages
	34,464.09
	14,213.73
Settlement	20,250.36

Plus parts to be replaced
No charge to VIPCO, Inc.

On July 23, 1964, Lett and William Noone, SCM's Regional Office Manager for the Eastern Zone (Noone, 731a), met with Redman in Richmond. (PX 1241) The purpose of their trip to Richmond was to "see if we couldn't settle whatever had to be settled". (Noone, 742a) (emphasis added) The product of these negotiations is set forth in detail in a memorandum written the same day by Noone to Kessler. (PX 1241)

The testimony at trial with reference to the settlement was as follows:

Joseph Lett:

Q. All right. Now, generally, sir, why were you and Mr. Noone meeting with Mr. Redman on that day? A. We went to settle the account on both sides of the fence, to make sure that Mr. Redman got what was due him and that SCM corporation got what was due us. (Lett, 340a) (emphasis added)

William Noone:

Q. When you went to Virginia Impressions what were your duties? What was your understanding of your instructions as to what you were to do when you got to Virginia Impressions? A. To see if we couldn't settle some of the disputed items that were open on the account. (Noone, 1186a) (emphasis added)

Q. And . . . (then) they told you to go down to Virginia Impression Products and clear up some discrepancies in the account, is that correct, sir? A. Yes, sir.

Q. Prior to the time they told you to do this nobody told you why Virginia Impression Products had been terminated? A. No, sir.

Q. And you never told Virginia Impression Products or anyone who worked there why they had been terminated, did you, sir? A. Not that I know, sir.

Q. You were down there to settle whatever had to be settled, right? (1097) A. That's right.

Q. Any by settling you mean settling the account and matters that related to the accounts?

A. Settling the dispute and concerning open items, right. (Boone, 1192a) (emphasis added)

Donald Redman:

Q. Mr. Redman, at the time you signed the agreement of September 11, 1964, did you understand that you were doing anything other than settling the account? A. No. (Redman 613a)

The Witness: My understanding was that it (the Settlement Agreement) formalized the settlement that I made with Mr. Noone in July of 1964. It was just to me a routine document settling all of our financial—certain differences that we had.

The Court: Are you saying that it set out the understanding you had with Mr. Noone? Is that what you are saying?

Witness: Yes, Your Honor.

The Court: All right.

The Witness: As far as I am concerned I settled with Mr. Noone. (Redman 614a)

Only Sexton, an SCM lawyer, expressed at trial his previously unexpressed intent, to settle an antitrust claim with Redman, a man he never met. (Sexton 1263a) It was Mr. Sexton who instructed Mr. Freeman, the lawyer he hired to formalize the agreement reached by Lett and Noone, "not to specify the claims being released," (Freeman, 1291a) Freeman obeyed Sexton's instructions and made no mention of any possible antitrust or unfair competition claim.[1] Finally, Sexton admitted that he did not know of any SCM employee who talked to Mr. Redman about antitrust claims. (Sexton 1264a).

Thus, the documentary evidence and testimony at trial is clear and consistent (excepting only Sexton's later conceived but secret intent) that nothing changed[2] between final negotiations

1. Freeman, 1290-91a.

2. As far as SCM's Regional Office Manager was concerned, after July 31, 1964, the date on which his memorandum to Kessler transmitted VIP's check in the amount of $9,157.39 and eight notes totalling $16,000.00 which had been submitted by VIP "in final settlement of the balance due", (PX 1242) as agreed upon during the July 23, 1964 meeting, it was merely a "collection matter" (Noone 1191a) Thus, as of July 31, 1964, SCM's demand of $34,464.09 (DX 1125) and VIP's offer of $20,250.36 (PX 1237) had been reconciled at $25,157.39. (PX 1242) SCM had their money in hand in the form of checks and notes and nothing remained to be solved except for the fact that Redman refused to pay interest on the eight notes (PX 1242), a matter which was beyond Noone's authority to resolve:

QUESTION (to Mr. Noone): Referring to this date of July 31, 1964, is it fair to state that you had resolved everything but the interest question with Mr. Redmond? ANSWER: Yes (746a). Noone had informed Redmond that if his refusal to pay interest on the notes was not acceptable the notes would be returned, but the matter was "resolved in a conversation between myself (Kessler) and Mr. Sexton" (752a) and so it was not necessary to return them. From then on, it was merely a matter of formalization through Mr. Freeman who, as stated above, conceded that he never mentioned antitrust to Mr. Redman.

between Redman and the fiscal people on July 31, 1964 and the formalization in writing on September 15, 1964. Moreover, Freeman conceded at trial that Sexton had told him that "he [Sexton] had approved a settlement worked out by the fiscal people at Virginia Impression Products". (Freeman 1290a)

In fact, after the Settlement Agreement had been signed, Sexton wrote to Kessler on September 30, 1964, and pointed out the obvious:

> You will note that the settlement agreement is essentially that which was set forth in Mr. Noone's memorandum of July 23, 1964 (DX 1778)